No. 96-320-CFX Title: Metro-North Commuter Railroad Company, Petitioner
v.
Michael Buckley

Docketed: August 30, 1996 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Aug 29 1996	Petition for writ of certiorari filed. (Response due September 29, 1996)
	Sep 27 1996	Motion of Association of American Railroads for leave to file a brief as amicus curiae filed.
	Sep 27 1996	Brief of respondent Michael Buckley in opposition filed.
	Sep 27 1996	Motion of Consolidated Rail Corporation for leave to file a brief as amicus curiae filed.
	Sep 30 1996	Motion of American Tort Reform Association for leave to file a brief as amicus curiae filed.
	Sep 30 1996	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
	Sep 30 1996	Motion of Port Authority of New York and New Jersey for leave to file a brief as amicus curiae filed.
	Sep 30 1996	Motion of Defense Research Institute for leave to file a brief as amicus curiae filed.
	Oct 8 1996	Reply brief of petitioner Metro-North Commuter Railroad Company filed.
	Oct 9 1996	DISTRIBUTED. November 1, 1996
	Nov 1 1996	Motion of Association of American Railroads for leave to file a brief as amicus curiae GRANTED.
	Nov 1 1996	Motion of Consolidated Rail Corporation for leave to file a brief as amicus curiae GRANTED.
	Nov 1 1996	Motion of American Tort Reform Association for leave to file a brief as amicus curiae GRANTED.
	Nov 1 1996	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Nov 1 1996	Motion of Port Authority of New York and New Jersey for leave to file a brief as amicus curiae GRANTED.
	Nov 1 1996	Motion of Defense Research Institute for leave to file a brief as amicus curiae GRANTED.
	Nov 1 1996	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 16, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 15, 1997. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. SET FOR ARGUMENT February 18, 1997. **********
	Dec 12 1996	Joint appendix filed.
	Dec 13 1996	Brief amicus curiae of Association of American Railroads filed.
	Dec 16 1996	Brief of petitioner Metro-North Commuter Railroad Company filed.
	Dec 16 1996	Brief amicus curiae of Owens-Illinois, Inc. filed.
	Dec 16 1996	Brief amicus curiae of Port Authority of New York and New

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No. 96-320-CFX

Entry	Date	Proceedings and Orders
		Jersey filed.
	Dec 16 1996	Brief amici curiae of Defense Research Institute, et al. filed.
	Dec 16 1996	Brief amicus curiae of American Tort Reform Association filed.
	Dec 16 1996	Brief amicus curiae of Owens Corning filed.
	Dec 16 1996	Brief amicus curiae of Washington Legal Foundation filed.
	Dec 16 1996	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	Dec 16 1996	Brief amici curiae of Chemical Manufacturers Association, et al. filed.
	Dec 16 1996	Brief amicus curiae of American Insurance Association filed.
	Dec 19 1996	CIRCULATED.
	Jan 14 1997	Brief of respondent Michael Buckley filed.
	Jan 14 1997	Brief amici curiae of Internatl. Assn. of Machinists and Aerospace Workers, et al. filed.
	Jan 14 1997	Brief amicus curiae of Rail Labor Executive Association filed.
	Jan 15 1997	Brief amici curiae of Association of Trial Lawyers of America, et al. filed.
	Jan 31 1997	Record filed.
	Feb 7 1997	Reply brief of petitioner Metro-North Commuter Railroad Company filed.
	Feb 18 1997	ARGUED.

Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in ruling that mere exposure to a potentially harmful substance, in the absence of any physical injury, is a sufficient basis for recovery under the Federal Employers' Liability Act ("FELA"), a ruling that, as the Second Circuit acknowledged, is in direct conflict with the Third Circuit's decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985)?

2. Whether the Second Circuit erred in holding that under *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), the zone of danger test is satisfied in FELA cases where an employee alleges mere exposure over a period of time to a potentially hazardous substance, but where there is no claim of actual physical injury or risk or fear of immediate physical injury?

3. Whether the Second Circuit, in contravention of this Court's opinion in *Gottshall*, has improperly discarded the essential common law requirements imposed to place rational limits on liability for negligent infliction of emotional distress: namely, (i) proof of physical injury, (ii) evidence of physical manifestation of emotional harm, and (iii) proof of emotional distress that is severe and substantiated by objective medical, psychiatric or clinical evidence?

4. Whether the Second Circuit erred in ruling that FELA permits a totally asymptomatic plaintiff to recover damages for future medical monitoring costs, a ruling that is in direct conflict with FELA's express statutory requirement of "injury" as a prerequisite to recovery?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner, Metro-North Commuter Railroad Company, is a railroad corporation that is a subsidiary of the Metropolitan Transportation Authority, a public authority of the State of New York. *See* Metropolitan Transportation Act, N.Y. Pub. Auth. Law §§ 1260 to 1279-b (McKinney 1982 & Supp. 1996). Metro-North Commuter Railroad Company does not have any subsidiary companies.

Respondent Michael Buckley is an individual.

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Petitioner Metro-North Commuter Railroad Company ("Metro-North") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (A-1 to A-8) has not been officially reported. The opinion of the United States Court of Appeals for the Second Circuit (A-9 to A-28) is reported at 79 F.3d 1337.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1996, and Metro-North's timely petition for rehearing was denied on July 10, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, is reproduced as Appendix D.

STATEMENT OF THE CASE

This case arises from plaintiff Michael Buckley's exposure to asbestos-containing insulation while working for Metro-North as a pipefitter in Grand Central Terminal in New York. (A-2) Plaintiff seeks damages for negligent infliction of emotional distress and for future medical monitoring under FELA. (A-4) Plaintiff is the "test plaintiff" for a group of approximately 140 plaintifs with essentially identical claims against Metro-North. (A-13)

It is undisputed that plaintiff has no asbestos-related disease or physical injury and in fact shows no physical effect

of any kind from asbestos exposure.[1] (A-3; A-20) Moreover, it is undisputed that plaintiff is not likely to develop an asbestos-related disease. (A-19) At trial, plaintiff's expert in occupational environmental health hazards, Dr. William Nicholson,[2] quantified Buckley's increased risk of dying of cancer, as a result of his exposure to asbestos, as only between one and five percent. (TR at 334) Dr. Nicholson further testified that "a death from asbestosis is not something Mr. Buckley has to worry about, although he might develop shortness of breath." (TR at 325)

Plaintiff also does not suffer from any physical manifestation of his alleged emotional distress. Moreover, his alleged distress is not documented by any objective medical, psychiatric or clinical evidence of any kind. (A-7 to A-8) Plaintiff has never sought psychiatric treatment, or seen a social worker or a counselor for his alleged emotional trauma. (TR at 797) According to plaintiff's expert, Dr. Steven Markowitz,[3] plaintiff did not display a level of concern warranting counseling. (TR at 549; A-8)

At the close of plaintiff's case-in-chief, the district court (Hon. Whitman Knapp, U.S.D.J.) granted Metro-North's motion for a directed verdict. The court held that plaintiff's exposure to asbestos did not satisfy the common

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[1] Plaintiff's amended complaint expressly states that he is "not bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness" or for any such condition "which may occur in the future." *See* Plaintiff's Amended Complaint ¶ 19.

[2] Dr. Nicholson is a professor at the Mount Sinai School of Medicine, one of the world's leading research centers on asbestos and health. (Trial Transcript at 291, *Buckley v. Metro-North Commuter Railroad*, No. 89 Civ. 7170-A(WK) ("TR"))

[3] Dr. Markowitz is a professor at the Mount Sinai School of Medicine. (TR at 209)

law "zone of danger" test, which this Court has adopted as a limitation on recovery for negligent infliction of emotional distress under FELA. (A-4; A-6 to A-7 (citing *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994)). The court also found that plaintiff "offered no objective evidence by which a jury could determine that he had suffered a real emotional injury" (A-8) and that "there [was] no way for a jury to determine whether plaintiff's alleged fear of developing the disease was reasonable." (A-6)

The Second Circuit reversed, holding that plaintiff could recover for negligent infliction of emotional distress because his exposure to asbestos was a "physical impact" and, by itself, satisfied the *Gottshall* zone of danger test. (A-18 to A-19) The Second Circuit stated that plaintiff could recover even though he did not suffer severe emotional distress or psychiatric harm, showed no physical manifestation of emotional distress, and presented no competent psychiatric, medical or clinical evidence of emotional distress. (A-24 to A-25) Further, the Second Circuit held that, despite the absence of physical injury or a likelihood of future injury, plaintiff could recover medical monitoring damages under FELA. (A-26) On July 10, 1996, the Second Circuit denied Metro-North's petition for rehearing with suggestion for rehearing en banc. (A-30 to A-31)

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision in this case is, as the Second Circuit acknowledged, in direct conflict with a decision by the Third Circuit, *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). (A-20 to A-21) In *Schweitzer*, the Third Circuit held that exposure to asbestos, without asbestos-related physical injury, does not constitute a basis for recovery under FELA. 758 F.2d at 942. The overwhelming majority of federal and state decisions under both FELA and the

common law are in accord with *Schweitzer* in denying recovery in asbestos exposure cases where there is no physical injury, including cases where claims for emotional distress have been asserted. In contrast, the Second Circuit has drastically expanded liability under FELA by allowing an asymptomatic plaintiff to pursue claims for emotional distress and future medical monitoring costs, based on his mere exposure to asbestos.

The Second Circuit's decision also is fundamentally inconsistent with this Court's recent decision in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994). In *Gottshall*, this Court held that purely emotional distress is compensable under FELA only if it meets the common law "zone of danger" test. *See id.* at 2410-11. In determining that plaintiff's exposure over time to asbestos satisfied the zone of danger test, the Second Circuit wrenched the test out of its common law boundaries. Well-settled law has restricted the test to claims arising out of sudden accidents or other traumatic events, which threaten a plaintiff with *imminent* physical harm, thereby causing the plaintiff to suffer fright and to fear for his own safety. Contrary to the Second Circuit, recent FELA decisions by federal and state appellate courts make clear that these traditional elements are required under the *Gottshall* zone of danger test. Moreover, the Second Circuit's decision conflicts with decisions by the Fifth Circuit and other courts, which have held that under the common law asbestos exposure cases do not meet the zone of danger test because these traditional elements are absent. In fact, Metro-North has found no other decision applying the zone of danger test in this context.

In addition to misapplying the zone of danger test, the Second Circuit rejected all the other requirements that the common law imposes to place rational limits on liability for negligent infliction of emotional distress: namely, that a

plaintiff's distress be severe, result in a physical manifestation, and be established by competent medical, psychiatric or clinical evidence. The Second Circuit's rejection of these requirements is irreconcilable with this Court's pronouncement in *Gottshall* that under FELA courts are not free to discard such common law restrictions on "the specter of unlimited and unpredictable liability." *See id.* at 2411.

The combined effect of the Second Circuit's holdings is an unprecedented and unjustifiable expansion of liability for negligent infliction of emotional distress. Under the Second Circuit's decision, every railroad worker alleging mere exposure to asbestos or other potentially harmful substances may have a claim under FELA for emotional distress, including distress that is trivial, insubstantial, or evanescent. Such a result is contrary to the great weight of authority under both FELA and the common law.

Finally, the Second Circuit's holding that a claim for medical monitoring damages is cognizable under FELA despite the absence of any physical injury is directly contrary to the statute's express requirement of an "injury" as a precondition to recovery.[4] *See* 45 U.S.C. § 51. Moreover, it is contrary to the basic common law principle that there can be no cause of action in tort without an actual injury. As *Schweitzer* and other cases make clear, under FELA, "injury" from asbestos exposure exists, and a cause of action may be deemed to have accrued, only when an asbestos-related disease is present. Alleged "subclinical changes," without any impairment or disease, are just that: merely changes, not cognizable injuries. *See Schweitzer*,

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[4] Plaintiff's purported need for medical monitoring does not arise from his alleged emotional injury, but rather from the possibility that he may later develop an asbestos-related physical injury. Therefore, his alleged emotional injury cannot serve as the basis for recovery of medical monitoring damages.

758 F.2d at 942; *cf. Urie v. Thompson*, 337 U.S. 163, 170 (1949) (worker exposed to silica dust is injured, and his cause of action accrues under FELA, only when adverse effects manifest themselves).

The Second Circuit's decision, if allowed to stand, will have extraordinary economic consequences upon railroads under FELA and as well as upon other entities, government and non-government, under other federal statutes and the common law. Although the Second Circuit attempted to limit its decision to "massive[ly]" exposed railroad workers (A-23), the decision will clearly be relied upon by untold numbers of other litigants in FELA, Jones Act, and common law cases for its expansive holdings. For these reasons and the reasons set forth below, Metro-North respectfully urges that this Court grant certiorari.

I. IN HOLDING THAT AN ASYMPTOMATIC PLAINTIFF WHO WAS EXPOSED TO ASBESTOS MAY RECOVER UNDER FELA, THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT AND WITH THE OVERWHELMING WEIGHT OF COMMON LAW AUTHORITY

The Second Circuit held in this case that mere exposure to asbestos, without any indication of disease or injury, can serve as a basis for recovery under FELA and the zone of danger test adopted by this Court in *Gottshall*. In so holding, the Second Circuit expressly "rejected the FELA cases finding that asbestos fiber inhalation cannot constitute an injury," including specifically the Third Circuit's decision in *Schweitzer*. (A-20 to A-21) The *Schweitzer* rule is identical to the common law of the overwhelming majority of jurisdictions. In abandoning that rule under FELA, the Second Circuit ignored this Court's admonition to adhere to the common law in deciding FELA cases. *See Gottshall*, 114 S. Ct. at 2404, 2410.

In *Schweitzer*, an asbestos case arising under FELA, the Third Circuit held that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." *Schweitzer*, 758 F.2d at 942 (relying on *Urie*, 337 U.S. at 170, where this Court ruled that an employee exposed to silica dust "can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves"). Although *Schweitzer* is not an emotional distress case, the *Schweitzer* rule properly governs emotional distress claims arising from asbestos exposure. As discussed below at Point II, in the absence of physical injury, emotional distress claims are cognizable under FELA only when they meet the zone of danger test. The required elements of that test are not met in asbestos exposure cases, and therefore, physical injury remains a prerequisite to recovery.

The Second Circuit's refusal to apply the *Schweitzer* rule in this asbestos exposure case conflicts not only with *Schweitzer*, but with the overwhelming majority of asbestos exposure cases under FELA, the Jones Act,[5] and the common law, including cases where claims for emotional distress or fear of cancer have been asserted. For example, the court in *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401, 1407-11 (W.D. Mo. 1988), dismissed claims brought under FELA for mental anguish allegedly caused by asbestos exposure where there was no physical harm, noting that such a rule was necessary to "keep[] the floodgates intact." *See also Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761 (N.D. Ill. May 9, 1986) (dismissing FELA claims based on asbestos exposure

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[5] The Jones Act incorporates Section 1 of FELA, 45 U.S.C. § 51. *See* 46 U.S.C. app. § 688(a).

where no current injury was alleged, citing *Schweitzer*); *In re Asbestos Prods. Liab. Litig. (No. VI)*, CA No. 2 MDL 875, 1996 WL 239863 (E.D. Pa. May 2, 1996) (dismissing Jones Act and state law claims based on mere asbestos exposure). Likewise, the Third, Fourth, and Fifth Circuits have held that, under the common law, exposure to asbestos or other substances, without physical harm, cannot support a claim for negligent infliction of emotional distress. *See Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985); *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 38 (4th Cir.), *cert. denied*, 502 U.S. 1033 (1992); *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986).[6]

The application of the *Schweitzer* rule in emotional distress cases rests on the same principles and policy considerations that this Court identified in *Gottshall*. Specifically, this Court mandated in *Gottshall* that courts applying FELA must look to the common law's substantial limitations on recovery for purely emotional injuries. *See Gottshall*, 114 S. Ct. at 2405-07, 2410-11. The Second Circuit discounted the policies underlying these limitations and sought to minimize the effect of its ruling by noting

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[6] *Accord Deleski v. Raymark Indus.*, 819 F.2d 377, 380 (3d Cir. 1987); *Redland Soccer Club, Inc. v. Department of Army*, 55 F.3d 827, 848 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Eagle-Picher Indus., v. Cox*, 481 So. 2d 517, 528 (Fl. Dist. Ct. App. 1985), *review denied*, 492 So.2d 1331 (Fla. 1986); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192-95 (Ky. 1994); *Doner v. Ed Adams Contracting*, 617 N.Y.S.2d 565, 566 (App. Div. 1994); *Simmons v. Pacor Inc.*, 674 A.2d 232, 238-39 (Pa. 1996); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988), *aff'd*, 872 F.2d 422 (9th Cir. 1989); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 904 (Va. 1981).

that "only a narrow class of plaintiff may sue under FELA." (A-22 (citing *Gottshall*, 114 S. Ct. at 2412 (Ginsburg, J., dissenting))) In so doing, the Second Circuit ignored this Court's admonition in *Gottshall* that the need to carefully limit liability exists "as a practical matter in the FELA context as well, even though the statute limits recovery to railroad workers." *See Gottshall*, 114 S. Ct. at 2409.

As the Third Circuit observed in *Schweitzer*, allowing recovery based on exposure alone would create limitless liability:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

758 F.2d at 942. The *Schweitzer* court concluded that "[r]equiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered." *Id.*

Similarly, United States District Judge Charles Weiner, who presides over the federal multidistrict asbestos personal injury litigation, recently dismissed the Jones Act and state law claims of 261 plaintiffs who alleged exposure to asbestos but had proffered no evidence of asbestos-related physical injury. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *5. Judge Weiner observed that the "judicial system has been faced with an onslaught of personal injury, asbestos cases for more than twenty years." *Id.* at *2. Citing the policy concerns set forth in *Schweitzer*, Judge Weiner emphasized that plaintiffs who

actually have asbestos-related diseases "suffer while the [c]ourt [system] is clogged" with filings by exposed plaintiffs who (like plaintiff here) have no asbestos-related injuries. *Id.* at *5.

In place of the *Schweitzer* rule, the Second Circuit announced a rule that purports to limit recovery to "unusual" cases of "lengthy" and "massive" asbestos exposure. (A-23) The terms "lengthy" and "massive" provide an inherently imprecise and unworkable standard; they are vague and without definition in the scientific and medical literature on asbestos and health. Furthermore, the Second Circuit does not provide any factual basis for its assumption that plaintiff's exposure was "unusual." Indeed, a 1981 study for the United States Department of Labor by a leading researcher on asbestos and health estimated that more than 21 million living American workers had been "significantly exposed" to asbestos during the previous 40 years. Irving J. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States* xiv (1981); *see also Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 & n.15 (5th Cir. 1985) (*en banc*) (discussing Selikoff study); *Eagle-Picher*, 481 So.2d at 528 & n.18 ("Millions of people have been exposed to asbestos"; permitting an action for fear of cancer without physical injury from asbestos "would likely devastate the court system as well as the defendant manufacturers"). The illogicality of the Second Circuit's standard is underscored by the fact that many persons exposed to asbestos never develop any asbestos-related disease.[7]

The Second Circuit's rejection of the *Schweitzer* rule also does violence to the FELA and general common law proscription against claim-splitting. Although not consid-

[7] *See In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1569-70 & n.10 (citing studies); *Doner*, 617 N.Y.S.2d at 566.

ered by the Second Circuit, the "single recovery" rule established under this Court's FELA jurisprudence is unavoidably implicated by the Second Circuit's decision. This Court has held that under FELA only one recovery may be had by an employee for an employer's wrongful act, and that the employee's right to recover is then extinguished. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931).

In the usual zone of danger case, no issue of claim-splitting arises: a plaintiff who escapes physical injury at the time of an accident or other traumatic event is not at risk of developing future physical injuries as a consequence of that event. His only possible claim is for emotional distress. In contrast, in asbestos exposure cases, a plaintiff may develop one or more asbestos-related injuries years after exposure. Under this Court's prior FELA decisions, if permitted to sue for emotional distress based on exposure alone, a plaintiff would be barred from a second suit if he should later develop an asbestos-related disease. *Cf., e.g., Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 410-12 (5th Cir.) (*en banc*) (Mississippi law) (under "single recovery" rule, a plaintiff suffering from one asbestos-related disease, such as asbestosis, may sue only once and must recover in that one suit damages for both his present disease and any other ailment that he is more likely than not to develop in the future), *cert. denied,* 478 U.S. 1022 (1986).

Although a number of jurisdictions have adopted a "separate disease" rule providing that asbestosis and cancer each constitute a separate cause of action even though arising from the same exposure to asbestos, *see, e.g., Eagle-Picher*, 481 So. 2d at 520, no court has permitted claim-splitting that would allow emotional distress claims to be pursued separate and apart from physical injury claims. Clearly, the better rule in asbestos cases is that adopted by

the overwhelming majority of courts, namely to restrict recovery for emotional distress to plaintiffs with actual physical injury caused by asbestos exposure.[8]

In sum, the Second Circuit's decision in this case directly conflicts with the Third Circuit's opinion in *Schweitzer* and the vast majority of common law cases. Moreover, the Second Circuit's decision conflicts with the fundamental policy considerations articulated by this Court in *Gottshall* and opens the courtroom door to tens of thousands (perhaps hundreds of thousands) of asymptomatic asbestos plaintiffs.

II. THE SECOND CIRCUIT MISINTERPRETED AND MISAPPLIED THE ZONE OF DANGER TEST ARTICULATED BY THIS COURT IN *GOTTSHALL*

Instead of adhering to the physical injury requirement set forth for asbestos cases in *Schweitzer*, the Second Circuit incorrectly ruled that plaintiff's exposure to asbestos met the zone of danger test, which this Court adopted in *Gottshall*. To reach this result, the Second Circuit abandoned all of the traditional requirements of the zone of danger test, namely, (i) an accident, near accident or other traumatic event, which (ii) subjects the plaintiff to a risk of *imminent* physical harm, (iii) causing fright and resultant emotional injury. The Second Circuit's ruling is fundamentally inconsistent with and impermissible under this Court's decision in *Gottshall*.

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[8] The cases relied on by the Second Circuit do not support abandoning the physical injury requirement: *Hagerty v. L & L Marine Servs.*, 788 F.2d 315, 316-17 (5th Cir. 1986) (plaintiff suffered dizziness, leg cramps, and a stinging sensation in his extremities, which court found to be physical injuries); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio Ct. C.P. 1987) (plaintiff had a physical injury - asbestosis).

In *Gottshall*, this Court determined that purely emotional distress is compensable under FELA only if it falls under the common law "zone of danger" test. 114 S. Ct. at 2410-11. Under the zone of danger test, "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." *Id.* This test, which provides an exception to the general common law rule allowing recovery for emotional distress only where the plaintiff has suffered a physical injury, arose in response to a special category of cases involving accidents and near accidents in which a plaintiff suffered fright and severe emotional distress. As courts recognized, the general rule arbitrarily denied recovery to a physically uninjured plaintiff while permitting the slightly injured plaintiff standing next to him to recover, even though the two had suffered the same fright and resultant emotional harm in a traumatic event. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982). Thus, the zone of danger test is based on the "realization that 'a near miss may be as frightening as a direct hit.'" *Gottshall*, 114 S. Ct. at 2406 (quoting Pearson, *supra*, at 488).

Courts have, however, defined specific boundaries to emotional distress claims under the zone of danger test so that every person who was ever frightened or claimed that his workplace was generally hazardous would not have a cause of action. The requirement that a plaintiff be within the zone of danger of imminent physical harm is ineluctably linked to recovery under the test; without such a risk of immediate harm, there can be no zone of danger.

Indeed, the early zone of danger cases cited by this Court in *Gottshall* make clear that the risk of imminent physical injury is an essential and defining element of the test; these cases all involve collisions or near collisions of trains, streetcars and carriages, or other sudden, traumatic events that caused fright, with resultant mental injury, to the plaintiffs. *See Gottshall*, 114 S. Ct. at 2406 & n.8. For example, in *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034 (Minn. 1892), after a near collision of streetcars, a pregnant passenger was allowed to recover for fright and physical injuries resulting from fright. As the court explained,

> a *collision* seemed so *imminent*, and was so nearly caused, that the incident and attending confusion of ringing alarm-bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of *immediate* death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness.

Id. at 1034 (emphasis added).[9]

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[9] The other early cases cited by this Court in *Gottshall*, 114 S. Ct. at 2406 n.8, involve similar circumstances: *Simone v. Rhode Island Co.*, 66 A. 202 (R.I. 1907) (streetcar collision caused plaintiff fright resulting in fainting, vomiting, insomnia, headache, physical pain, three months in bed, and nervous disorders and weakness up to time of trial); *Kimberley v. Howland*, 55 S.E. 778 (N.C. 1906) (blasting sent rock crashing through plaintiff's house, causing plaintiff fright, shock, near miscarriage, and nervous physical pain and suffering); *Gulf, C. & S. F. Ry. v. Hayter*, 54 S.W. 944 (Tex. 1900) (plaintiff in train collision could recover for fright and shock resulting in physical injury); *Mack v. South-Bound R. Co.*, 29 S.E. 905, 906 (S.C. 1898) (plaintiff "just barely escaped being struck by the locomotive and cars, and . . . owing to the great and imminent danger . . . was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he, for a long time, was made ill and sick and suffered great mental anguish and physical pain"); *Pankopf v. Hinkley*, 123 N.W. 625 (Wis. 1909) (collision between car and horse-drawn carriage caused plaintiff severe fright and shock, and resultant miscarriage, severe pain and permanent injury to health); *Stewart v. Arkansas S. R. Co.*, 36 So. 676 (La. 1904) (fright from train accident resulted in plaintiff's suffering miscarriage and subsequent ill health); *Watson v. Dilts*, 89 N.W. 1068 (Iowa 1902) (plaintiff suffered shock, fright, apprehension for her own life, prostration, nervous paralysis, and great mental and physical pain when defendant broke into home and assaulted husband).

Nor have more recent cases expanded the boundaries of the zone of danger test. Such cases allow recovery only for fright and attendant emotional distress caused by danger of immediate physical injury from an accident or other sudden, traumatic event. For example, in *Robb v. Pennsylvania Railroad Co.*, 210 A.2d 709, 714 (Del. 1965), cited by this Court in *Gottshall*, 114 S. Ct. at 2406 n.9, the Delaware Supreme Court adopted the zone of danger test to permit recovery for fright and emotional distress in a case where a plaintiff fled uninjured from her car seconds before the car was hit by a train.[10]

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[10] Also cited by this Court in *Gottshall* were *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (*en banc*) (car accident); *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (explosion); *Rickey v. Chicago Transit Authority*, 457 N.E.2d 1 (Ill. 1983) (escalator accident); *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984) (automobile accident); *Garrett v. City of New Berlin*, 362 N.W.2d 137 (Wis. 1985) (plaintiff in a group of children chased by police car). Conversely, the other recent zone of danger cases cited by this Court in *Gottshall* disallow recovery where the plaintiff was not at risk of, and did not fear, immediate physical injury: *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990) (*en banc*); *Resavage v. Davies*, 86 A.2d 879 (Md. 1952); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990) (*en banc*); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978); *Boucher v. Dixie Medical Ctr.*,

So, too, in FELA cases both before and after this Court's decision in *Gottshall*, the zone of danger test has been restricted to claims arising out of sudden accidents or other traumatic events that present a danger of immediate physical injury, causing fright and severe emotional distress. For example, in *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994), the court held that, under FELA and *Gottshall*, the zone of danger concept requires that plaintiff "was subject to a reasonable fear of *immediate* personal injury" (emphasis added). Accordingly, plaintiff was not in a zone of danger by virtue of the proximity of a worker who had on occasion punched other workers. The court emphasized that the "threat of injury" to the plaintiff "was not immediate," but rather was "both speculative and remote." *Id.* at 434; *see also Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776, 783 (Ohio 1995) (plaintiff was in zone of danger because he was threatened with a chipping hammer and nearly run over with a truck by fellow employees, and thus placed in risk of immediate harm), *cert. denied*, 116 S. Ct. 776 (1996); *Grube v. Union Pac. R.R.*, 886 P.2d 845, 851 (Kan. 1994) ("fear for one's safety is an essential element of the zone of danger test and must be expressed at or near the time of the danger"); *Garcia v. Burlington N. R.R.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is at 'immediate risk of physical harm'") (citation omitted).[11]

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850 P.2d 1179 (Utah 1992); *Jobin v. McQuillen*, 609 A.2d 990 (Vt. 1992).

[11] *See also Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 78 (3d Cir. 1991); *Gillman v. Burlington N. R.R.*, 878 F.2d 1020, 1023 (7th Cir. 1989); *Wilson v. Consolidated Rail Corp.*, 810 F. Supp. 411, 416 (N.D.N.Y. 1993); *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436, 442 (E.D. La. 1993) (Jones Act); *Crooks v. Metro-North Commuter R.R.*, No. 93 Civ. 6030 (JSM), 1994 WL 719683 at *2

Contrary to the Second Circuit's holding, the zone of danger test simply does not apply to this fear of disease case. Plaintiff is not complaining about a "near miss" accident or other traumatic event that he witnessed or experienced. Nor does plaintiff allege that his workplace exposure to asbestos placed him in danger of immediate personal injury or that he suffered fright. On the contrary, by its very terms, plaintiff's claim urges the antithesis of a risk of immediate harm: he bases his claim on an alleged risk of injury that may occur at some indefinite time in the future. As such, plaintiff's claim falls well outside the boundaries of the "zone of danger" test.

Indeed, not only is the Second Circuit alone in applying the zone of danger test in asbestos litigation, but other courts have expressly declined to do so. As the court in *Nutt v. A.C. & S., Inc.*, 466 A.2d 18 (Del. Super. Ct. 1983), *aff'd*, 480 A.2d 647 (Del. 1984), stated, because "[c]linical symptoms may not be observable until after many years of exposure, and disability may progress even after exposure has ceased . . . [t]he nature of the asbestos related injury, whether considered on an exposure or a manifestation basis, is clearly incompatible with the traumatic event requirement for recovery of mental anguish under [the zone of danger test]." 466 A.2d at 25; *see also Wisniewski*, 759 F.2d at 273-74 (Pennsylvania law) (rejecting argument of uninjured asbestos plaintiffs that zone of danger test allowed recovery for emotional distress).

Similarly, the Fifth Circuit rejected a plaintiff's argument that recovery for mental anguish allegedly caused by asbestos exposure was permitted under Louisiana's "ordeal"

(S.D.N.Y. Dec. 28, 1994); *Bianco v. Philadelphia, Bethlehem & New England R.R.*, No. Civ. A. 93-4828, 1995 WL 89036, at *3 (E.D. Pa. Mar. 2, 1995); *Dziegelewski v. Consolidated Rail Corp.*, No. 93 Civ. 2666 (MBM), 1995 WL 63155 at *2 (S.D.N.Y. Feb. 15, 1995).

rule, which is essentially equivalent to the zone of danger test.[12] *See Adams v. Johns-Manville Sales Corp.*, 783 F.2d at 592-93. The Fifth Circuit explained that while the Louisiana cases "allowed recovery for mental anguish engendered by a proven traumatic ordeal which did not result in physical injury," such cases did not recognize any right of recovery for mental anguish arising from fear of future complications from asbestos exposure where plaintiff had not proved that he had sustained any present injury from such exposure. *Id.* at 593.

The Second Circuit's conclusion to the contrary turns upon its determination that plaintiff suffered a "physical impact," namely, exposure to asbestos. (A-19) In ruling that plaintiff could recover on this basis, the Second Circuit incorrectly treats physical impact as a basis for recovery separate and apart from the requirement that plaintiff have been within the zone of danger.

The Second Circuit's error derives from its misunderstanding of certain language in *Gottshall* describing the zone of danger test as "limit[ing] recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 114 S. Ct. at 2406. With respect to the zone of danger requirement, this is not, as the Second Circuit appears to have concluded, a disjunctive test; on the contrary, in the very next sentence, this Court explained precisely what it meant: "That is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" *Id.* (citation omitted).

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[12] In near-miss accident and other traumatic event cases, Louisiana's "ordeal" rule permits an uninjured plaintiff to recover for fright and mental anguish. *See Adams*, 783 F.2d at 593 (citing, *e.g.*, *Carroll v. State Farm Ins. Co.*, 427 So. 2d 24 (La. Ct. App. 1983)).

Stated simply, there exists no separate test under *Gottshall* which permits a FELA plaintiff to recover for negligent infliction of emotional distress whenever that plaintiff can demonstrate some sort of "physical impact," regardless of whether that plaintiff is in the zone of danger. Indeed, such an impact test was one of the "[t]hree major limiting tests for evaluating claims alleging negligent infliction of emotional distress" that this Court considered in *Gottshall*. *See id.* This Court expressly declined to adopt such a test, rejecting it in favor of the zone of danger test. *See id.* at 2411.

Interpreting the zone of danger test, as the Second Circuit has done, to include a separate impact test that has nothing to do with the zone of danger and the concomitant risk of imminent harm would give rise to the absurd and much criticized results that led to the abandonment of the old "physical impact" test in the first place. *See, e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 363-6 (5th ed. 1984) (noting the expansion of the meaning of the "impact" test and observing: "The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery.") (citation omitted). Although early cases under the old impact rule required a physical injury caused by an impact, gradually the impact rule was relaxed, as courts struggled to find a way to allow recovery in cases where an uninjured plaintiff had suffered great fright and emotional trauma from a near-miss accident. *See Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994). Thereafter, in some jurisdictions, the impact rule was further diluted so as to allow recovery in cases where there had been an impact of any kind no matter how slight, regardless of whether there had been an accident, a near accident, or a zone of danger. Finally, as Professors Prosser and Keeton observe, "[a] Georgia circus case reduced the matter to something of an absurdity by

finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap." *See* Keeton *et al.*, *supra*, at 364. This is *not* the rule that this Court adopted in *Gottshall*. Rather, the zone of danger test, as adopted in *Gottshall*, removed the rationale for the diluted and arbitrary "physical impact" test by allowing both impacted and unimpacted plaintiffs to recover for emotional distress provided their distress arose from fright caused by the threat of imminent physical harm while in the zone of danger. *See Bloom*, 41 F.3d at 916 n.6.

In sum, under the prevailing principles of law and public policy articulated in *Gottshall* and other cases, the zone of danger test does not permit recovery under FELA for alleged emotional distress caused by exposure to asbestos. The Second Circuit's decision to the contrary is an unsound and erroneous expansion of liability.

III. THE SECOND CIRCUIT, IN CONTRAVENTION OF *GOTTSHALL*'S MANDATE, DISCARDED WELL-ESTABLISHED COMMON LAW LIMITATIONS ON RECOVERY FOR EMOTIONAL DISTRESS

In addition to its misapplication of the zone of danger test, the Second Circuit improperly discarded every other requirement imposed by the common law to place rational limits on liability for negligent infliction of emotional distress -- namely, that a plaintiff's emotional distress must result in a physical manifestation, be severe, and be substantiated by competent medical or psychiatric evidence.[13] Abandonment of these limitations creates an unprecedented expansion of liability for negligent infliction of emotional

[13] These issues were not, and need not have been, addressed in *Gottshall* because both plaintiffs clearly satisfied all three of these requirements. *See* 114 S. Ct. at 2400-02.

distress, a result that is in direct conflict with this Court's mandate in *Gottshall* to preserve common law limitations on recovery for such claims. As this Court observed in *Gottshall*, "[o]ur FELA cases require that we look to the common law . . . , and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 114 S. Ct. at 2411; *see also id.* at 2404 (common law principles "must play a significant role" and "are entitled to great weight" in analysis of negligent infliction of emotional distress under FELA).

A. The Second Circuit Erred in Holding That No Physical Manifestation of Emotional Distress Is Required

The Second Circuit declined to require that plaintiff's alleged emotional distress manifest itself in physical symptoms. (A-21) With this ruling, the Second Circuit contravened the "overwhelming weight of authority across the nation," which holds that to be compensable, emotional distress must result in "some physical manifestation." *See Plummer v. Abbott Labs.*, 568 F. Supp. 920, 926-27 (D.R.I. 1983).[14] Indeed, as this Court observed in *Atchison, Tope-*

[14] For other cases requiring physical manifestation, *see, e.g., Robb*, 210 A.2d at 714-715 (Del.); *Hatfield v. Max Rouse & Sons Northwest*, 606 P.2d 944, 955 (Idaho 1980); *Payton v. Abbott Labs*, 437 N.E.2d 171, 181 (Mass. 1982); *State ex rel. Woyke v. Tonka Corp.*, 420 N.W.2d 624, 627 (Minn. Ct. App. 1988); *Sears Roebuck & Co. v. Young*, 384 So. 2d 69, 71, 73 (Miss. 1980); *Corso v. Merrill*, 406 A.2d 300, 308 (N.H. 1979); *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965); *Melton v. Allen*, 580 P.2d 1019, 1021-22 (Or. 1978); *Reilly v. United States*, 547 A.2d 894, 896-97 (R.I. 1988); *Nelson v. WEB Water Dev. Ass'n, Inc.*, 507 N.W.2d 691, 699 (S.D. 1993); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92, 95 (Vt. 1980).

ka & Santa Fe Railway v. Buell, "[o]ne leading commentary states that '[i]n the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character.'" 480 U.S. 557, 569 n.18 (1987) (quoting Keeton *et al.*, *supra*, at 64); *see also Gottshall*, 114 S. Ct. at 2407 n.11.

The majority view that physical manifestation is required is also reflected in the Restatement (Second) of Torts, which states:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Restatement (Second) of Torts § 436A (1965).

Significantly, the requirement of physical manifestation was the prevailing rule under the common law at the time of FELA's enactment in 1908. *See* note 9, *supra*; *see also Gottshall*, 114 S. Ct. at 2410 (looking to "state of common law in 1908, when FELA was enacted" and noting "historical pedigree" of zone of danger test). In addition, contrary to the Second Circuit, courts in recent cases have specifically required a physical manifestation of emotional distress under FELA. *See Williams v. Carnival Cruise Lines*, 907 F. Supp. 403, 406-07 (S.D. Fla. 1995) (applying *Gottshall* and requiring that emotional distress be accompanied by "physical manifestation" under FELA and Jones Act); *Amendola*, 699 F. Supp. at 1410 (pre-*Gottshall*, requiring asbestos plaintiff under FELA to show physical harm either causing or caused by emotional distress); *cf. Ellenwood v. Exxon Shipping Co.*, 795 F. Supp. 31, 34-35 (D. Me. 1992) (in light of FELA and Jones Act case law,

requiring physical manifestation under general maritime law), *aff'd in relevant part*, 984 F.2d 1270 (1st Cir.), *cert. denied, 508 U.S. 981 (1993)*.

As these courts have recognized, the physical manifestation requirement furthers the fundamental policy concerns that this Court identified in *Gottshall* for imposing limitations on liability. *See Amendola*, 699 F. Supp. at 1411 (the physical manifestation test "will serve to limit trivial, frivolous, or premature claims" under FELA). The Restatement also emphasizes these policy concerns:

> [E]motional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial . . . . It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants.

Restatement (Second) of Torts § 436A, cmt. b (1965).

In sum, absent a requirement of physical manifestation, a defendant's liability for claims of emotional distress under FELA would be unpredictable and nearly infinite -- the very result the common law limitations on emotional distress claims were designed to avoid. *See Gottshall*, 114 S. Ct. at 2408-09.

B. The Second Circuit Incorrectly Held That Emotional Distress Is Compensable Even If It Is Not Severe

The Second Circuit also departed from well-settled common law principles in holding that plaintiff could recover for emotional distress that, as the Second Circuit acknowledged, was not severe. (A-25) Contrary to the Second Circuit's holding, courts have overwhelmingly ruled that there can be no recovery for the negligent infliction of emotional distress if the distress is not severe. As this

Court observed in *Buell*, 480 U.S. at 567 n.13, "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *See also Roberts v. Saylor*, 637 P.2d 1175, 1180 (Kan. 1981) ("it is only when emotional distress is extreme that possible liability arises"); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995) (requiring a "high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment or anger").[15] In fact, Metro-North has found no case that supports the Second Circuit's claim that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact."[16] (A-24)

Numerous courts and commentators have noted that the severity requirement serves not only to guarantee the genu-

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[15] *Accord, e.g., Williams v. Baker*, 572 A.2d at 1068; *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981); *Robertson v. Geophysical Service, Inc.*, 469 So. 2d 22, 24 (La. Ct. App. 1985); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 437 (Me. 1982); *K.A.C. v. Benson*, 527 N.W.2d 553, 559 (Minn. 1995); *Parrish v. Omaha Pub. Power Dist.*, 496 N.W.2d 914, 915 (Neb. 1993); *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chems. Co.*, 578 A.2d 1248, 1250 (N.J. Super. Ct. App. Div. 1990); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 97 (N.C. 1990); *Muchow v. Lindblad*, 435 N.W.2d 918, 923 (N.D. 1989); *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432, 442-43 & n.23 (Wis. 1994).

[16] The Second Circuit's reliance on two trial court decisions (A-24) is misplaced. *Lacy v. Cooper Hospital/University Med. Ctr.*, 745 F. Supp. 1029, 1035 (D.N.J. 1990), does not discuss physical impact or distinguish between severe and non-severe emotional distress, but rather applies a longstanding exception to the threshold physical injury requirement in cases where a corpse has been mishandled. *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478 (Ohio Ct. C.P. 1987), involved a plaintiff who had an actual physical injury (asbestosis). Moreover, Restatement (Second) of Torts § 436A, cited by the Second Circuit, requires physical harm, not merely physical impact.

ineness of emotional distress claims, but also to limit the variability and unpredictability of awards for emotional distress and the unlimited liability that would result if relatively trivial emotional distress were compensable. *See, e.g., Parkway*, 901 S.W.2d at 443-44. Moreover, like the physical manifestation requirement, the severity requirement accords with the purposes of FELA. As this Court observed in *Gottshall*, the basic rationale for finding that emotional injury is an injury within the meaning of Section 1 of FELA was the recognition that "severe emotional injuries can be just as debilitating as physical injuries." 114 S. Ct. at 2408. It is within the purpose of the statute to compensate such injuries; it is not within the purpose of the statute to compensate non-severe emotional distress of the kind alleged by plaintiff in this case.

C. The Second Circuit Erred by Not Requiring Medical or Psychiatric Evidence of Emotional Distress

The Second Circuit overturned the trial court's finding that plaintiff presented no objective evidence of his emotional distress. (A-24 to A-25) To reach this result, the Second Circuit departed from the well-established common law rule imposing upon plaintiffs the burden of presenting some objective medical, psychiatric or clinical evidence of alleged emotional distress.[17] The rationale for this basic

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[17] *See, e.g., Aurora v. Burlington N. R.R.*, 31 F.3d 724, 726 (8th Cir. 1994) (requiring proof of "medically significant" emotional distress; testimony by psychiatrist that plaintiff was "anxious and depressed" but did not need medication or follow up treatment was insufficient as a matter of law); *accord Kadans v. Citicorp Mortgage, Inc.*, 26 F.3d 131 (9th Cir. 1994) (unpublished, table; text at 1994 WL 242112, at *1) (Nevada law); *Silver v. Mendel*, 894 F.2d. 598, 607 n.19 (3d Cir. 1990), *cert denied*, 496 U.S. 926 (1990); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1406 (W.D. Mo. 1994); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (*en banc*); *Parrish*, 496 N.W.2d

evidentiary requirement is similar to the policy considerations discussed above which underlie the other common law requirements for negligent infliction of emotional distress. In particular, courts have observed that the requirement of medically provable and diagnosable mental distress defines an appropriate middle ground of liability, between the "Scylla of unlimited liability" which would result from a "broad definition of 'emotional harm' -- one which includes upset, anger, and grief" -- and the "Charybdis of no liability" which would result from a requirement of permanent mental damage. *Bass v. Nooney Co.*, 646 S.W.2d 765, 773 n.4 (Mo. 1983) (*en banc*) (citation omitted).

In this case, the evidence cited by the Second Circuit indisputably does not meet the common law standard of proof. Plaintiff presented *no* medical or psychiatric evidence of emotional distress. He never consulted a psychiatrist, social worker, or counselor, (TR at 797-98), and his own expert testified that he did not display a level of concern warranting counseling. (TR at 549; A-8) Indeed, even the Second Circuit characterized the evidence it cited of plaintiff's emotional distress as "slim." (A-24) That evidence consisted of evidence that Metro-North employees complained about working conditions and of plaintiff's own conclusory allegations of fear and anger. (A-24) Such evidence does not constitute proof of emotional distress, much less the required objective medical or psychiatric proof.

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at 915-16 (Neb.); *Kohn v. Schiappa*, 656 A.2d 1322, 1325 (N.J. Super. Law Div. 1995); *Leone v. Leewood Srv. Station*, 624 N.Y.S.2d 610, 613 (App. Div.), *appeal denied*, 658 N.E.2d 221 (N.Y. 1995); *Muchow*, 435 N.W.2d at 923 (N.D.); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 974-75 (Utah 1993).

There is no support in the common law to permit such a totally unverified claim of emotional distress to go to a jury. Moreover, under Section 1 of FELA, a compensable injury is a mandatory statutory element of a cognizable claim, and it is an element which plaintiff must prove. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *3. The Second Circuit has effectively removed the need not only for objective medical or psychiatric proof of emotional injury, but the need for any objective evidence whatsoever.[18] Under the Second Circuit's standard, a plaintiff's conclusory allegations of the most trivial and transitory distress will suffice to establish a compensa-ble emotional injury. The Second Circuit's ruling is contrary to well-settled common law principles and common sense and warrants reversal by this Court.

IV. THE SECOND CIRCUIT ERRED IN ALLOWING AN ASYMPTOMATIC PLAINTIFF TO RECOVER MEDICAL MONITORING DAMAGES, IN DIRECT CONFLICT WITH FELA'S STATUTORY "INJURY" REQUIREMENT

The Second Circuit determined that plaintiff's separate claim for medical monitoring damages was cognizable under FELA "despite the fact that he has yet to suffer an asbestos-related disease." (A-26) This conclusion is directly contrary to the express language of the statute, which requires an injury as the basis for recovery. FELA pro-

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[18] In refusing to require objective medical, psychiatric or clinical evidence, the Second Circuit inappropriately relied on civil rights cases under 42 U.S.C. § 1983. In such civil rights cases, an independent constitutional tort, with an injury such as job discrimination or false imprisonment, serves as the basis for awarding emotional distress damages flowing from the tort. *See, e.g., Bolden v. Southeastern Pa. Transp. Auth.*, 21 F.3d 29, 34 (3d Cir. 1994) (citing *Carey v. Piphus*, 435 U.S. 247 (1978)); *Miner v. City of Glen Falls*, 999 F.2d 655, 662 (2d Cir. 1993). No such independent tort exists in this case.

vides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering . . . *injury* or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (emphasis added). The Second Circuit ignored the dispositive fact that, under the applicable caselaw of this Court, plaintiff in this case suffered no "injury" that could serve as the statutory -- and factual -- basis for his claim for medical monitoring damages.

In *Urie v. Thompson*, 337 U.S. 163 (1949), this Court held that under FELA a worker exposed to a potentially harmful substance is not "injured," and thus may not be deemed to have a cause of action, until and unless "the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170; *see also Schweitzer*, 758 F.2d at 942. Here, the accumulated effects of plaintiff's asbestos exposure have not manifested themselves in any way; indeed, plaintiff is totally asymptomatic. Therefore, plaintiff suffers from no cognizable injury to support a medical monitoring claim under FELA. *See Batko v. Ogilvie*, 1986 WL 5761, at *1, *3 (under FELA, denying claims for future medical costs where plaintiffs had been exposed to asbestos but had no injury).[19]

Even if one assumes *arguendo* that plaintiff in this case suffered an emotional injury compensable under FELA, the medical monitoring damages plaintiff seeks to recover have no factual nexus to that injury. Plaintiff's purported need for medical monitoring does not arise from his alleged emotional injury, but rather from the possibility that he may later develop an asbestos-related disease. Therefore,

[19] None of the medical monitoring cases cited by the Second Circuit arises under FELA or any other statute imposing a comparable "injury" requirement.

his alleged emotional injury cannot serve as the basis for recovery of medical monitoring damages.

Moreover, by allowing medical monitoring damages in the absence of any physical injury, the Second Circuit embraced a novel theory of damages that is contrary to traditional common law principles and, indeed, has been recognized in only a small minority of jurisdictions. In so doing, the Second Circuit improperly disregarded the fundamental policy considerations for limiting liability that this Court identified in *Gottshall*. Such policy concerns have been cited by courts in denying recovery under state common law for medical monitoring in the absence of physical injury. As one court observed:

> [t]here is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants.

Ball v. Joy Mfg. Co., 755 F. Supp. at 1372.[20] Furthermore, allowing uninjured plaintiffs to bring causes of action for medical monitoring will consume scarce judicial resources, postponing recovery for the injured. *See, e.g.*, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 575-76 (1992) ("As between the claims of the already impaired and the claims of those who are not now (and may never become) sick, . . . society should accord higher priority to the former.").

[20] *See also Thomas v. FAG Bearings*, 846 F. Supp. at 1410 (same); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at *51-52 (W.D.N.C. Oct. 29, 1990).

Ultimately, however, in this case, it is not up to the Second Circuit or even this Court to resolve the policy questions raised by the medical monitoring claim asserted by this totally asymptomatic plaintiff. The statute is clear: such a cause of action is not permitted under FELA in the absence of a present injury. The courts may not rewrite the statute; it is up to Congress, if it desires to do so, to change the law to permit such a cause of action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDICES

APPENDIX A -- DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 13, 1995

MICHAEL BUCKLEY, Plaintiff,

v.

METRO-NORTH COMMUTER RAILROAD, Defendant.

No. 89 Civ. 7170-A(WK).

United States District Court,

S.D. New York

March 13, 1995.

WHITMAN KNAPP, Senior District Judge.

This is a case brought under the Federal Employers Liability Act ("FELA") by one of the "snowmen of Grand Central Terminal" for negligent infliction of emotional distress caused by defendant Metro-North's negligent exposure of plaintiff to asbestos from June of 1985 to early September, 1987. Because defendant had conceded negligence, the only issues at trial were causation and damage. At the close of plaintiff's case, defendant moved for a directed verdict. Because we find that plaintiff failed to prove that he had sufficient impact with asbestos to result in a reasonable fear of developing an asbestos-related disease; and because he failed to prove that he had suffered a real emotional injury, we grant defendant's motion and direct a verdict in its favor.

Statement of the Facts

Drawing all reasonable inferences in plaintiff's favor, the relevant facts are as follows: Plaintiff Michael Buckley is a 39-year-old pipefitter who has worked for Metro-North at Grand Central Terminal since 1985. When Buckley was first hired as a pipefitter, Metro-North ordered him to work in the network of steam tunnels that run beneath Grand Central Terminal. There are miles and miles of pipes in those tunnels, covered with white insulation.

As a pipefitter, Buckley was assigned to repair and maintain these pipes. To do so, Buckley would have to remove the old white insulation from the pipe he was working on. He would take whatever tools he had available--a hammer, axe, wire shears--and pound the insulation away from the area where he had to work. As he did so, the insulation would break apart and fall to the floor. Buckley would kick it aside to get it out of his way, releasing clouds of white insulation dust into the air. He would become covered with this dust--it would get into his hair, his face, his mouth, his nose, his clothes. He would come up from the steam tunnels literally covered from head to toe with white insulation dust. Thus the nickname "snowman of Grand Central."

Most of this white insulation dust was asbestos, a known cancer-causing substance. Over a three-year period, from June of 1985 to June of 1988, Buckley worked on average for one hour a day actually removing and handling this insulation. Metro-North admits that it knew asbestos was present in Grand Central Terminal and that it knew of the hazard that working with and around asbestos posed to the health of its employees. It admits that it negligently exposed plaintiff to asbestos from June 1985 until early September of 1987. Metro-North admits that during this period it did not warn plaintiff that he was being exposed to asbestos, nor did it provide training for him on how safely to handle asbestos.

On August 31, 1987, Metro-North sent Buckley and his co-workers to an all-day asbestos awareness class. There, Buckley was told that the insulation he had been working with was asbestos, and that asbestos exposure causes painfully deadly diseases such as lung cancer, mesothelioma and asbestosis. At that class, Buckley was shown how to remove asbestos insulation, and was given a half-face respirator that was not fit-tested. He was also shown two videotapes: one of men lying in hospital beds gasping painfully for air as they slowly died from asbestos disease; and another that indicated that smoking contributed to the risk of developing lung cancer, and that smokers who work with asbestos could cut their risk of developing cancer by a significant amount if they quit smoking. Buckley has a history of smoking about a pack a day since he was seventeen. In 1991, Buckley cut down to an average of one cigarette a day, which is what he now smokes.

Subsequent to learning about his exposure to and the dangers of asbestos, Buckley contacted the law firm of Cahill, Goetsch and DiPersia, which he retained to represent him in this law suit. In 1990 and again in 1994, one of the lawyers sent him to the Mount Sinai Occupational and Environmental Health Clinic. There, he was examined by Dr. Steven Markowitz, who gave expert testimony that as a result of Buckley's exposure to asbestos, he has a 1 to 3 percent increased risk of dying from asbestos-related cancer, and a 10 percent increased risk of developing scarring of the lining of the lungs. He further testified that it takes 20 to 40 years for clinical signs of asbestos disease to develop, and that Buckley currently showed no physical signs of asbestos exposure. He recommended that Buckley continue to be medically monitored for future signs of asbestos-related disease. Another professor from Mount Sinai, Dr. William Nicholson, also examined Buckley and testified that Buckley's risk of dying from cancer as a result of his

asbestos exposure has been increased by between 1 and 5 percent.

Buckley brought this law suit seeking the cost of his past and future medical monitoring expenses and for negligently inflicted emotional distress, consisting of loss of peace of mind, anxiety, fear of the future, anger, worry and distress due to his increased risk of dying from cancer.

Physical Impact

Taking all the facts plaintiff alleged as true, there is not sufficient evidence to allow a jury to find that plaintiff has had the requisite physical impact or fear of physical impact to warrant a finding of negligent infliction of emotional distress. On this question, there is no categorical authority. Rather, there are a number of guideposts. The most recent and authoritative of these is the Supreme Court's July, 1994 opinion, *Consolidated Rail Corporation v. Gottshall* 114 S.Ct. 2396, in which the Court established that negligent infliction of emotional distress is an action cognizable under the Federal Employers' Liability Act ("FELA"). In so holding, however, the Court indicated its concern that "recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants." *Id.* at 2405.

To avoid such a result, the Court placed "substantial limitations on the class of plaintiffs that may recover for emotional injuries, and on the injuries that may be compensable." *Id.* at 2405. The Court indicated that one such limitation would be the common law "zone of danger" test:

> Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for

> injuries--physical and emotional--caused by negligent conduct of their employers that threatens them imminently with physical impact."

Id. at 2410.

The Second Circuit followed *Gottshall* in *Marchica v. Long Island Railroad Co.* (2d. Cir. 1994) 31 F.3d 1197. In that case, the court found that a railroad employee whose finger had been penetrated by a needle and subsequently suffered a fear of contracting the AIDS virus could recover on a claim of negligent infliction of emotional distress. In so holding, the court reasoned that plaintiff had met the *Gottshall* "zone of danger" test because plaintiff had actually suffered a physical injury: a hypodermic needle had penetrated his body. The court went on to note, however, that "had Marchica merely touched the discarded needle and become concerned about the possibility of developing AIDS, the case would stand on a very different footing." *Id.* at 1204.

Clearly, the Second Circuit was mindful of the Supreme Court's concern of creating infinite liability for defendants. Much of the opinion focuses on various means of assessing the genuineness of a claim for negligent infliction of emotional distress absent a physical injury. In such a case, where no physical injury has occurred, the court suggested that proof of exposure to a contaminated substance was a "substitute means for providing a guarantee of the merits of a plaintiff's claim." *Id.* at 1204. Only with such evidence of exposure can plaintiff show that fear of developing a disease related to the contaminated substance is reasonable. Relying on other "fear-of-developing-disease" cases, the court adopts the proposition that "the exposure requirement--plus actual likelihood of developing the disease-- ... is a means of ensuring the genuineness of the claim." *Id.* at 1205. *See also Doner v. Admans Contracting Inc.* (A.D. 3 Dep't. 1994) 617 N.Y.S.2d 565, 566 ("Mental anxiety occasioned by the

fear of developing a disease is not considered reasonable unless there is, at the very least, some evidence substantiating both actual exposure to the disease-causing agent ... and a likelihood of contracting the disease as a result").

The case at bar, like that envisioned by the *Marchica* court, is "on very different footing." Here, there was no physical injury analogous to being pricked by a hypodermic needle. Therefore, we must consider the Second Circuit's other means of assessing the genuineness of plaintiff's claim: whether plaintiff can show proof of exposure to asbestos such that there was a sufficient likelihood of contracting a disease to make plaintiff's fear reasonable. On the present record, he has made no such showing.

There is plenty of evidence in this case that plaintiff was around asbestos, even touched by asbestos. But there is no proof, assuming that he had occasionally inhaled asbestos, that he inhaled inhaled enough to create a reasonable fear of developing an asbestos-related disease.[1] Plaintiff's own expert, Dr. Nicholson indicated that determining an individual's actual exposure to asbestos is "fraught with difficulties because it depends upon individual sensitivity and the uncertainties of the time course of the individual's exposure." (469-70). This is hardly evidence of actual exposure and actual likelihood of developing a disease. Thus there is no way for a jury to determine whether plaintiff's alleged fear of developing the disease was reasonable.

The Supreme Court and the Second Circuit are unequivocal in holding that these tests to determine the genuineness of plaintiff's claim must be met. In the case at bar, plaintiff does not fall within the zone of danger as envisioned by the

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[1] For the purposes of this case, "exposure" to asbestos should be understood to mean "inhalation" of asbestos, for it is only inhalation that leads to asbestos-related disease.

Supreme Court or the Second Circuit: he has not sustained a physical injury; and he offered no evidence to establish that he was sufficiently exposed to asbestos to create a reasonable fear of developing an asbestos-related disease. Thus the claim fails as a matter of law.

Emotional Injury

Even if plaintiff had been able to establish that he fell within *Gottshall's* zone of danger, he did not offer sufficient evidence to allow a jury to find that he suffered a real emotional injury.

On this question, no specific form of proof, such as medical testimony, is required. However, the cases dealing with the subject tell us is that there is need for some objective evidence, apart from the plaintiff's own testimony concerning his or her own supposed agony. For example, in *Miner v. City of Glens Falls* (2d. Cir. 1993) 999 F.2d 655, plaintiff was a police officer who lost his job, allegedly without due process. The court found that plaintiff could recover on a claim for negligent infliction of emotional distress because in addition to plaintiff's own testimony of feeling inadequate, embarrassed, anxious and exasperated to such a degree that he contemplated suicide, the court found that

> the anguish he described has some objective correlation with events described by [plaintiff] and by his wife: loss of their house, family tensions, certain potentially demeaning aspects of a former police officer having to seek benefits.

Id. at 663.

Plaintiff in the case at bar provides no analogous objective evidence. Despite the emotional distress plaintiff claims, he continued working in the Grand Central Terminal even though it is undisputed that he could have transferred to any

one of several asbestos-free facilities where both he and his father had previously worked. Moreover, even after being warned by a doctor and viewing the videotape about smoking, plaintiff continued to smoke cigarettes "whenever I feel like having one." (773). The only objective fact to which plaintiff testified was that he lost his temper more frequently with his wife, but even that he conceded was related in part to the instant law suit. Moreover, unlike the situation in *Miner*, his wife gave no testimony in support of this claim.[2]

Dr. Markowitz, who examined plaintiff for almost two hours and was trained in psychology, did not refer plaintiff either to a psychologist or to a social worker. When asked by the Court why he did not make such a referral, he responded that "if [plaintiff] had displayed that level of concern to me I might have considered [referring him to a counselor]. I might have said, well, you ought to get some counseling about this. But I didn't see it." (549)[3]

Thus, because plaintiff has offered no objective evidence by which a jury could determine that he had suffered a real emotional injury, his claim for negligent infliction of emotional distress must also be dismissed.

SO ORDERED.
New York, New York
March 13, 1995

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[2] Plaintiff testified that following the asbestos awareness class in late 1987, he had expressed his anger and concern over what had happened to him by complaining to his Metro-North foremen, supervisors, superintendents, and ultimately to the MTA Inspector General's Office. However, as with the evidence concerning plaintiff's arguments with his wife, no corroborative testimony was offered.

[3] this response was given to a question posed out of the presence of the jury, but is nonetheless part of the record.

APPENDIX B -- DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 1, 1996

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 608 -- August Term, 1995

(Argued: December 8, 1995 Decided: April 1, 1996)

Michael BUCKLEY,

Plaintiff-Appellant,

v.

METRO-NORTH COMMUTER RAILROAD,

Defendant-Appellee.

Before:

FEINBERG and OAKES,

Circuit Judges.[1]

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[1] Honorable Guido Calabresi, C.J., heard oral argument but later disqualified himself and did not participate in the decision of this court.

Appeal from the judgment as a matter of law granted by the United States Court for the Southern District of New York, Whitman Knapp, Senior Judge, in favor of Appellee on Appellant's claims for negligent infliction of emotional distress and medical monitoring arising under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.* (1994).

Vacated and remanded.

Charles C. Goetsch, New Haven, CT
(Cahill Goetsch & DiPersia, P.C., of counsel),
for Plaintiff-Appellant.

William G. Ballaine, New York, NY
(Mark S. Landman, Lisa S. Rabinowitz,
Ann Marie Collins, Siff Rosen P.C., of counsel),
for Defendant-Appellee.

OAKES, *Senior Circuit Judge*:

Michael Buckley ("Buckley") appeals from the judgment as a matter of law granted by the United States District Court for the Southern District of New York, Whitman Knapp, *Senior Judge*, in favor of Metro-North Commuter Railroad ("Metro-North"). Buckley claims negligent infliction of emotional distress and medical monitoring costs arising under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1994) ("FELA"), for asbestos exposure Buckley suffered while working as a Metro-North pipe fitter in Grand Central Terminal. Buckley claims the district court erred in refusing to submit his negligent infliction of emotional distress claim to the jury and in failing to address his claim for medical monitoring. For the reasons stated below, we vacate and remand.

BACKGROUND

In reviewing the district court's judgment as a matter of law in favor of Metro-North, we consider the facts in the light most favorable to Buckley, the non-moving party. *Purgess v. Sharrock*, 33 F.3d 134, 140 (2d Cir.1994).

Buckley, who is 41 years old, has worked for various railroad companies in different capacities since the early 1970s. In June 1985, he began to work for Metro-North as a pipe fitter, repairing and maintaining the labyrinth of pipes in the steam tunnels of Grand Central Terminal in New York City. These pipes were covered with a white insulation material that Buckley and the other pipe fitters needed to remove before performing any repair or maintenance work. Buckley would hammer, cut, and pull the insulation material, using any tools on hand, in order to expose the pipe. The insulation, a dry, dusty sort of material, would break apart as it was removed, scattering particles into the air--"just like taking baby powder and shaking it," as Buckley said. Fans used to make bearable the intense heat of the steam tunnels would further spread dust from the pieces of insulation that accumulated on the floors of the tunnels. During the work day, this dust would cover Buckley's skin and clothes and enter his nose and mouth, so that he could taste the chalky insulation material. Because Buckley and the other pipe fitters would emerge from their daily duties in the tunnels covered head to toe with white powder, they were dubbed the "snowmen of Grand Central."

The insulation material that Buckley was exposed to during his work day for roughly three years was asbestos, widely recognized as a carcinogen since the mid-1970s. Metro-North admitted that it knew the insulation was composed of asbestos and that asbestos can cause cancer. In fact, Metro-North had been cited for asbestos-related violations in September 1986 following a fire in Grand Central Terminal. Metro-North further admitted that, despite its

knowledge of the problem, it did not warn Buckley that the substance covering him when he emerged from the tunnels was asbestos, nor did it train him regarding safe handling of asbestos.

On August 31, 1987, nearly a year after the fire and the asbestos citations, Metro-North finally required that pipe fitters attend an asbestos awareness class. At this class, Buckley learned of the asbestos in the pipe insulation. He was told that asbestos is a substance that can cause painful, debilitating, and often deadly disease such as asbestosis, lung cancer, and mesothelioma, a cancer of the pleura that lines the outside of the lungs. He viewed videotapes depicting people suffering from these diseases. He received instruction on asbestos removal by the "glove bag" method and was given a half-face respirator. The respirator, however, was not fit-tested. He was also shown a video that explained that smoking increases one's risk of lung cancer, and that smokers exposed to asbestos can decrease their risk of lung cancer if they quit smoking.

Buckley attempted to use the half-face respirator at work, but it fit poorly and slid down his face as he perspired in the intense heat of the steam tunnels. He also attempted to use the glove bag method of removal, but the plastic bags used to isolate the asbestos during the procedure would melt on the hot pipes after the insulation was removed, spilling out the asbestos that was supposed to be safely contained in the bags. In 1991, Buckley, who had smoked heavily since he was seventeen, cut down his smoking to an average of one cigarette a day.

After learning of the asbestos in the insulation, the pipe fitters wrangled with Metro-North over the issue of safety. They also contacted the White Lung Association, an advocacy group for victims of asbestos exposure, to inform themselves about the hazards of asbestos. When their complaints to Metro-North management went unresolved, the

workers contacted the Office of the New York State Attorney General, which investigated Metro-North in conjunction with the Inspector General of the Metropolitan Transit Authority. Because he "wanted Metro-North to be held accountable for what they did," Buckley contacted a law firm to pursue a case against Metro-North, as did as many as 140 other asbestos-exposed workers. Buckley's case was set up as a "test case" for the claims of all of the workers.

Buckley's attorney referred him to the Mount Sinai Occupational and Environmental Health Clinic for a medical evaluation. He was examined by Dr. Steven Markowitz and Dr. William Nicholson, who both testified as experts at trial. The doctors noted that Buckley currently showed no signs of asbestos-related diseases, but explained that the latency period for these diseases is not less than ten years and commonly ranges between 20-40 years. The doctors stated that Buckley was exposed to extremely high levels of asbestos as a pipe fitter for Metro-North, and agreed that, as a result of the asbestos exposure, Buckley suffered an increased risk of dying from an asbestos-related cancer. Dr. Markowitz characterized the increased risk as "significant," and, when pressed, quantified the increased risk as one to three percent. Dr. Nicholson quantified the increased risk as one to five percent, and stated that in his opinion there was a reasonable scientific basis to fear that Buckley will develop an asbestos-related cancer. Dr. Markowitz further noted that Buckley suffers a ten percent higher risk of developing scarring of the lining of the lungs due to on-the-job asbestos exposure.

Dr. Markowitz pointed out that Buckley's exposure could not be documented by x-ray until scarring developed, and a biopsy of the lungs could not be conducted because live tissue samples are not performed until disease has developed. In Dr. Markowitz's opinion, though, while working with the dry, chalky insulation, Buckley inhaled a great deal of thin,

needle-like asbestos fibers that have lodged in Buckley's lungs and could create grave health problems later in life. He recommended that Buckley continue to be medically monitored for future signs of asbestos-related diseases, noting that early detection of some of these diseases, such as lung cancer, could improve Buckley's prognosis.

Buckley testified that he is fearful of developing an asbestos-related disease. He is angry at Metro-North and no longer trusts his employer to provide a safe workplace. He said that because of the asbestos exposure he worries about his future, becomes upset when he sees media reports about asbestos, and is overprotective of his young son. He has not, however, undergone any psychiatric treatment for his fears. As he stated, "[w]hat is a psychiatrist going to do for me? What is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?"

After denying Metro-North's motion to dismiss, the district court directed that the case proceed to trial. *See Giammona v. Metro-North Commuter R.R.*, 750 F. Supp. 662 (S.D.N.Y. 1990). In 1994, Buckley became the test plaintiff for the claims of all the exposed employees, and a jury trial commenced in February 1995. Because Metro-North conceded negligence, only the issues of causation and damages were placed before the jury. At the close of Buckley's case, and before Metro-North commenced its case, Metro-North filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The court granted Metro-North's motion and dismissed the jury.

DISCUSSION

Buckley contends the district court erred when it entered a judgment as a matter of law in favor of Metro-North at the close of Buckley's case. He asserts that his claim of negligent infliction of emotional distress and his claim for medical monitoring costs should have been submitted to the jury.

A district court may grant a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 only if no reasonable jury could find for the non-moving party. *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993). There must be "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Id.* (quoting *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F.2d 163, 168 (2d Cir. 1980)). In examining a motion for judgment as a matter of law, the court "must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor." *Purgess*, 33 F.3d at 140.

In reviewing a judgment as a matter of law, we apply the same standard as the district court. *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 52 F.3d 1124, 1131 (2d Cir. 1995). Here, we must determine whether the district court correctly concluded that no reasonable jury could have found for Buckley on his claim of negligent infliction of emotional distress under FELA.

Section 1 of FELA, 15 U.S.C. § 51 (1994), states:

> Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .

Congress designed FELA as a "broad remedial statute" for railroad workers injured on the job because of employer negligence. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62, 107 S.Ct. 1410, 1413-14, 94 L.Ed.2d 563 (1987). As the Supreme Court has noted, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Id.* at 561, 107 S.Ct. at 1413. However, "[o]nly to the extent of these explicit statutory alterations is FELA 'an avowed departure from the rules of the common law.' " *Consolidated Rail Corp. v. Gottshall*, ___ U.S. ___, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994) (quoting *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958)). In other respects, the common law retains "great weight" in any judicial consideration. *Id.*

By the plain language of the statute, a "common carrier by railroad" is liable if one of its employee is injured due to the negligence of the common carrier. There is no dispute that Metro-North, a carrier by rails engaged in interstate commerce, employed Buckley. Furthermore, Metro-North has conceded negligence. Thus, this case turns upon whether Buckley's claim of emotional harm suffered as a result of Metro-North's negligence is an injury compensable under FELA.

I. Negligent Infliction of Emotional Distress

In *Gottshall,* the Court stated that "[b]ecause FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in [a court's] decision." *Id.* at 2404. The common law in nearly every state, the Court found, allows plaintiffs to bring claims for negligent infliction of emotional distress and therefore such claims are cognizable under FELA. *Id.* at 2405.

The Court recognized that because "[t]he incidence and severity of emotional injuries are ... more difficult to predict than those of typical physical injuries[,] ... negligent infliction of emotional distress [claims] hold [ ] out the very real possibility of nearly infinite and unpredictable liability for defendants." *Id.* For this reason, the Court noted, the common law has sought to limit recovery for negligent infliction of emotional distress. Some jurisdictions allow recovery only to those whose emotional distress stemmed from a physical impact; others allow recovery to those who, though suffering no physical impact, were within the zone of danger; and still others allow recovery to those who, though not within the zone of danger, witnessed the death or severe injury of a relative. *See id.* at 2406-07.

The Court analyzed these common-law restrictions on negligent infliction of emotional distress claims and adopted the zone of danger test as a proper limitation on recovery, balancing the concern for predictable liability with the broad remedial nature of FELA. The Court found that a negligent infliction of emotional distress claim may be brought by "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 2406, 2410.

Here, the district court found that Buckley did not fulfill the test for negligent infliction of emotional distress actions set forth in *Gottshall* because he did not suffer "sufficient impact with asbestos" to sustain a claim and "failed to prove that he had suffered a real emotional injury." We first address the district court's finding regarding physical impact and then turn to its finding regarding Buckley's emotional injury.

A. Physical Impact

As we noted above, a plaintiff may state a claim for negligent infliction of emotional distress only if the plaintiff suffers a physical impact or the defendant's conduct "threatens [the plaintiff] imminently with physical impact"--the zone of danger test. *Gottshall* at 2410.

We disagree with the district court's finding that Buckley did not suffer "sufficient impact with asbestos" to sustain a claim for negligent infliction of emotional distress. We hold that the district court erred in granting Metro-North a judgment as a matter of law because, from the evidence presented at trial, a reasonable jury could conclude that Buckley suffered a physical impact with asbestos.[1]

There is ample evidence in the record that the asbestos dust coated Buckley's skin and clothes, entering his nose, eyes, and mouth. Indeed, he could actually taste the chalky insulation material. When viewed in the light most favorable to Buckley, the evidence shows that he suffered a massive exposure to asbestos.[2] One need only visualize the image evoked by the pipe fitters' nickname--"the snowmen of Grand

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[1] Buckley does not claim damages for increased risk of developing disease. In order to recover for an increased risk of disease, as opposed to negligent infliction of emotional distress based upon fear of disease, a plaintiff must show a physical impact and a probability that the disease will actually develop in the future. *See Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 319-20 (5th Cir. 1986), *modified*, 797 F.2d 256 (5th Cir. 1986). The evidence in this case would not support such a claim, because Buckley cannot demonstrate a probability that he will develop an asbestos-related disease.

[2] We do not believe that Buckley's claim should be defeated because he cannot quantify the amount of asbestos to which he was exposed. The reason no tests of asbestos levels were performed during the period of exposure was that Metro-North did not wish to disclose the presence of asbestos and therefore did not conduct any such tests.

Central"--to understand the extent of Buckley's exposure to asbestos.

Furthermore, Buckley's expert witnesses testified that Buckley inhaled a large quantity of thin, needle-like asbestos fibers due to the work conditions imposed by Metro-North. When inhaled, asbestos fibers become imbedded in lung tissue and, according to Buckley's experts, cause subclinical changes to occur. Eventually, after ten to forty years, deadly and debilitating diseases may develop.

Metro-North argues that such exposure does not constitute an impact unless clinical signs of asbestos-related disease develop. Though both experts testified that Buckley's lungs had suffered subclinical changes, they admitted that Buckley had yet to display any verifiable clinical signs of asbestos exposure. However, the evidence Buckley presented showed that the absence of clinically verifiable proof is not dispositive. Given the strong evidence of massive exposure and the expert testimony regarding the likelihood of inhalation and its effect, we think a reasonable jury could find that Buckley suffered a physical impact from large amounts of asbestos fibers despite the lack of clinical proof of asbestos exposure. We cannot find as a matter of law that Buckley's injuries are not genuine simply because they are subcellular. The effect of asbestos in the lungs is a subtle, complex matter. It is for the jury, assisted by expert testimony, to determine whether Buckley has suffered present harm.

Our recent decision in *Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 727, 130 L.Ed.2d 631 (1995), supports our conclusion that a reasonable jury could find that Buckley sustained a physical impact from his exposure to asbestos. In *Marchica*, we found that a railroad worker suffered a physical impact sufficient to recover for fear of contracting the AIDS virus when a discarded hypodermic needle stabbed the worker's hand while he was cleaning up an area of a railroad station

notorious as a haven for drug users. *Id.* at 1206. We held that, even though it was never determined that the AIDS virus was present in the needle, such an injury "would cause a reasonable person to develop a fear of AIDS." *Id.* We noted that "[h]ad Marchica merely touched the discarded needle and become concerned about the possibility of developing AIDS, the case would stand on a very different footing." *Id.* at 1204. The distinction between a stab wound and a touch rests upon the method by which the AIDS virus is transmitted. The AIDS virus cannot be contracted simply by touching: penetration and contact with body fluid is required. A fear of developing AIDS absent such contact would be unreasonable.

Similarly, the fear of developing an asbestos-related disease from an incidental contact with asbestos would be unreasonable. Asbestos, as the evidence at trial showed, exists in small quantities in the air we breathe each day and such low-level contacts do not in any way affect the vast majority of people. Buckley, however, does not claim that his fear arises from normal contact with asbestos in the ambient air. Rather, as Buckley's counsel explained, Buckley's fear stems from "exposure to hazardous amounts of asbestos for an average of one hour per day while actual[ly] removal[ing], handling and working [with] asbestos insulation ... during the period from June of 1985 to June of 1988." Buckley offered evidence that such an exposure causes a measurable increase in the possibility of his developing asbestos-related disease. Just like the needle puncture in *Marchica*, Buckley's three years of daily contact with the cancer-causing substance--contact that from time to time left him covered from head to toe in asbestos dust--constitutes a physical impact that would lead a reasonable person to fear asbestos-related cancer.

For this reason, we reject the FELA cases finding that asbestos fiber inhalation cannot constitute an injury. *See*

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *Amendola v. Kansas City So. Ry. Co.*, 699 F. Supp. 1401, 1403 n. 3, 1410-11 (W.D. Mo. 1988). While these cases express a concern over speculative or frivolous lawsuits, the Marchica case makes clear that the relevant inquiry is whether the impact would cause fear in a reasonable person. To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body. Given the evidence of Buckley's prolonged and pronounced exposure to asbestos, a jury may find that he suffered an impact that would cause fear in a reasonable person.

Metro-North urges us to follow those common law fear-of-disease cases holding that exposure to a carcinogen is not in and of itself enough to constitute a physical impact. It is true that many cases hold that a fear-of-disease plaintiff must prove both actual exposure to a disease and a reasonable medical probability of later developing a disease. *See Marchica*, 31 F.3d at 1204 and cases cited therein; *Doner v. Ed Adams Contracting Inc.*, 208 A.D.2d 1072, 1072-73, 617 N.Y.S.2d 565, 566 (3d Dept. 1994) (though plaintiff could prove actual exposure to asbestos, plaintiff failed to show he was likely to contract a disease and thus could not prevail on emotional distress claim). Other courts insist a plaintiff prove the exposure caused a present physical injury, that a future disease will likely develop, or that the emotional injury has manifested itself physically. *See Marchica*, 31 F.3d at 1204 and cases cited therein; *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (fear of asbestos disease not rational unless plaintiff experiences functional impairment); *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 378, 752 P.2d 28, 31 (Ct. App. 1987) (no cause of

action for fear of disease absent bodily injury); *Eagle-Picher Industries, Inc. v. Cox,* 481 So.2d 517, 527-28 (Fla. Dist. Ct. App. 1985) (same).

As we noted in *Marchica,* however, such cases are inapposite when, as here, a plaintiff's emotional distress results from an actual physical impact or injury. *See Marchica,* 31 F.3d at 1204.[3] Furthermore, many courts have found that under certain circumstances exposure to asbestos or other disease- causing agents may constitute an impact sufficient to sustain a claim for fear of disease. *See, e.g., Hagerty,* 788 F.2d at 318 n. 1 (seaman soaked with toxic chemicals suffered a "physical injury from the drenching which constitutes an impact"); *Wetherill v. University of Chicago,* 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (prenatal exposure to DES is a physical impact); *Lavelle v. Owens-Corning Fiberglas Corp.,* 30 Ohio Misc. 2d 11, 14, 507 N.E.2d 476, 480 (Com. Pl. 1987) (exposure to asbestos while working with insulation is a physical contact sufficient to allow fear of cancer claim to proceed). We choose to follow these cases and hold that a reasonable jury could find that Buckley suffered a physical impact.

We decline to narrow our view of physical impact in order to avoid the flood of litigation that Metro-North claims we will unleash by this decision. First, "a more flexible view" of physical impact is "most consistent with FELA's remedial nature." *Marchica,* 31 F.3d at 1206. Second, only a narrow class of plaintiffs may sue under FELA, *see Gottshall,* 114 S. Ct. at 2412 (Ginsburg, J., dissenting), and FELA protects this group of plaintiffs from the negligent acts of employers to a greater extent than the plaintiffs would be protected at common law. Third, even within the narrow class of FELA

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[3] The terms "impact" and "injury" were used interchangeably by the *Marchica* court to describe the needle prick suffered by Marchica.

plaintiffs, Buckley and the other "snowmen" present what we believe is an unusual case, as Buckley's exposure to asbestos was massive, lengthy, and tangible. Finally, Metro-North has admitted that it negligently allowed the pipe fitters to perform their duties without any knowledge on their part of the presence of asbestos or any training in its proper handling. We do not believe that the magnitude of Metro-North's wrong should limit the damages awarded against it. Thus, taking all inferences in favor of Buckley, we find that a jury, presented with the evidence in this case, may find that Buckley suffered an impact that would cause fear in a reasonable person.

B. Emotional Injury

Even if a plaintiff suffers a physical impact that would cause fear in a reasonable person, the plaintiff will not be permitted to recover unless he or she actually suffers an emotional injury as a result of the physical impact. The district court held that no reasonable jury would find that Buckley suffered emotional distress. Because the district court believed that Buckley offered no corroborating evidence of his emotional distress, and because Buckley continued to smoke cigarettes after learning that smoking increases the risk to those exposed to asbestos, the court held that Buckley's claimed emotional distress was not serious enough to be compensable.

Though a plaintiff need not present medical proof of emotional distress, some *objective* proof apart from plaintiff's testimony must be offered in order for a jury to determine that the plaintiff suffered real emotional injury. *Miner v. City of Glens Falls,* 999 F.2d 655, 663 (2d Cir.1993). We disagree with the district court that there is a complete lack of objective proof in this case. Buckley testified that because of his fear and anger, he complained first to his supervisors and then to the Metropolitan Transit Authority Inspector General ("I.G.") about the asbestos in the tunnels. The

district court said Buckley failed to corroborate these complaints, but one worker who testified, Gregory Peck, stated that "we went to the I.G." when asked on cross-examination how he found out that "everything that [Metro-North] did was wrong." In addition, the joint report issued by the I.G. and the New York State Attorney General's Office, admitted into evidence, detailed the workers' complaints to supervisors and investigative bodies. This evidence, though slim, may provide substantiation of Buckley's claim.

Metro-North urges that regardless of whether Buckley provided any objective proof of emotional distress, he has not suffered emotional injury severe enough to sustain his claim. To permit an award for emotional distress arising out of a fear of cancer, a plaintiff must "introduce evidence of his particular fears with some specificity" and "as a threshold matter, present evidence of his particular fear of developing cancerous conditions." *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 858-59 (5th Cir. 1988). Buckley's testimony about his anger and fear of dying satisfies this burden. It appears from our review of case law that emotional distress must be "severe" only when a plaintiff has not suffered a physical impact. In such a case, the severity of the emotional distress serves to guarantee the genuineness of the claim. *See Lacy v. Cooper Hosp./Univ. Med. Ctr.*, 745 F. Supp. 1029, 1035-36 (D.N.J. 1990); *Lavelle*, 30 Ohio Misc.2d at 14-15, 507 N.E.2d at 480-81; *Restatement (Second) of Torts* § 436A (1965); *compare Restatement (Second)* § 46 (to prove *intentional* infliction of emotional distress, plaintiff's emotional distress must be "so severe that no reasonable [person] could be expected to endure it"). Here, as we discussed above, a reasonable jury could find that Buckley has suffered a physical impact. Buckley is therefore entitled to all damages flowing from the impact, including his reasonable emotional distress, so long as the jury finds based upon

Buckley's testimony and objective evidence that Buckley actually suffers from the fear and anger he claims.

We realize that the evidence of Buckley's emotional distress is not overwhelming. He does not suffer the sort of severe distress claimed by the plaintiff in *Marchica,* 31 F.3d at 1201, and there is not an abundance of evidence corroborating his claims. However, we do not believe that a jury need rely only upon "sheer surmise and conjecture," *Samuels,* 992 F.2d at 14, in order to find Buckley suffered emotional distress. Therefore, we find that the district court erred in granting Metro-North a judgment as a matter of law on Buckley's negligent infliction of emotional distress claim.

II. Medical Monitoring Costs

As a separate claim, Buckley seeks to recover for the cost of future medical monitoring. The district court failed to address this claim at all in its judgment as a matter of law in favor of Metro-North. We find that medical monitoring costs are a reasonable basis for an award of damages in this case. We believe that the evidence presented by Buckley could convince a reasonable jury to grant medical monitoring damages.

Dr. Markowitz testified that because of Buckley's exposure to asbestos, he is at an increased risk of developing an asbestos-related disease which will peak between the ages of fifty and sixty-five. Dr. Markowitz stated that because of this risk, Buckley should be provided with present and future medical monitoring in order to detect and treat the diseases as they may arise, including an annual medical exam with pulmonary function tests and chest x- rays. Beginning at age 45, Buckley should also undergo a sigmoidoscopy and stool tests every other year. Dr. Markowitz estimated the annualized cost of these tests at $950.00.

It is hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred as a result of an

injury. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 90 (1935). We believe that Buckley should be compensated for such medical monitoring as is reasonably necessary according to contemporary medical principles applied by physicians experienced in the diagnosis and treatment of asbestos diseases. We agree with a number of other courts that such costs are

> a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure ... the toxicity of [asbestos], the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, ... surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.

Ayers v. Township of Jackson, 106 N.J. 557, 606, 525 A.2d 287, 312 (1987). We find that Buckley may recover such costs despite the fact that he has yet to suffer an asbestos-related disease. As one court has noted, "the appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer harm in the future, but rather whether medical monitoring is ... necessary in order to diagnose properly the warning signs of disease." *In re Paoli R.R. Yard PCB Litigation (Paoli I)*, 916 F.2d 829, 851 (3d Cir. 1990), *cert. denied*, 499 U.S. 961, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991). *See also Gibbs v. E.I. DuPont de Nemours & Co., Inc.*, 876 F. Supp. 475, 478 (W.D.N.Y. 1995) (citing *Paoli I* with approval); *Gerardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657, 659, 566 N.Y.S.2d 1002, 1004 (Sup. Ct. 1991) (defendant liable for medical monitoring expenses incurred by plaintiff due to "invasion of the body by toxic substances through negligent exposure"); *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 137, 477 N.Y.S.2d 242, 247 (4th Dept. 1984) (medical monitoring

cost recoverable if plaintiff can establish to a reasonable degree of medical certainty that costs are "reasonably anticipated"); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 1006-07, 25 Cal. Rptr.2d 550, 863 P.2d 795, 822-23 (1993) (even in the absence of physical injury, reasonably certain medical monitoring costs may be recovered). Given the expert testimony in this case regarding impact, increased risk, and the necessity of monitoring, a reasonable jury could award Buckley medical monitoring costs.

Any award should be limited to costs incurred as a direct result of Buckley's asbestos exposure, rather than as a result of his history of smoking. We agree with the Third Circuit that a plaintiff must:

> prove that by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure. This is because under this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff.

In re Paoli R.R. Yard PCB Litigation (Paoli II), 35 F.3d 717, 788 (3d Cir. 1994) (quoting *Hansen v. CCI Mech.*, 858 P.2d 970, 980 (Utah 1993) (citations omitted)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1253, 131 L.Ed.2d 134 (1995). Therefore, a jury may only award to Buckley damages for that medical monitoring which is necessary because of his exposure to asbestos.

Competent expert testimony in this case established both that Buckley suffered a substantial impact from asbestos that

has significantly increased his risk of contracting an asbestos-related disease and that Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos-related disease he develops. The costs of such tests are a traditional element of tort damages, and a reasonable jury may award them to Buckley in this case.

CONCLUSION

For the reasons stated above, we vacate the judgment as a matter of law entered in favor of Metro-North and remand this case to the district court for a jury trial.

APPENDIX C -- DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10 day of July one thousand nine hundred and ninety-six.

Buckley

Plaintiff-Appellant

v Dkt No. 95-7399

Metro-North Commuter

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Metro-North Commuter Railroad Company's.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By:

/s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

APPENDIX D -- RELEVANT STATUTES

UNITED STATES CODE

TITLE 45 -- RAILROADS

CHAPTER 2--LIABILITY FOR INJURIES TO EMPLOYEES

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries of employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for

the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

FILED
SEP 27 1996
OFFICE OF THE CLERK

No. 96-320

In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether the practical effect of this FELA case is confined to the unique facts concerning the Snowmen of Grand Central Terminal, a handful of 141 railroad workers who, due to the Railroad's negligent violation of OSHA asbestos regulations in GCT during the late 1980s, now have a significant increased risk of death from cancer as a result of ingesting into their lungs massive amounts of carcinogenic asbestos fibers on a daily basis for three years, and whose prolonged massive asbestos exposure will never be experienced by any other employees so long as employers comply with OSHA's mandatory regulations for asbestos in the workplace.

2. Whether there is any conflict between the Third Circuit's 1985 decision in *Schweitzer*, which held that FELA claims for physical asbestos injuries are not dischargeable bankruptcy claims until they become physically manifest, and the Second Circuit's decision in this case, which applied this Court's 1994 *Gottshall* standard for FELA negligently inflicted emotional distress claims to the unique facts concerning the Snowmen of Grand Central Terminal's massive exposure to asbestos and resulting significant increased risk of death from cancer.

3. Whether the Second Circuit was correct in ruling that a railroad worker's negligently unprotected ingestion of massive amounts of carcinogenic asbestos fibers into his lungs on a daily basis for three years resulting in a significant increased risk of death from cancer constitutes a "physical impact" under this Court's *Gottshall* standard sufficient to support a FELA negligent infliction of emotional distress claim.

4. Whether the Second Circuit was correct in ruling that when a railroad worker suffers negligently inflicted emotional distress as a result of a physical impact with bodily harm, the resulting emotional distress need not be severe to be recoverable under the FELA.

5. Whether the Second Circuit was correct in ruling that given their significant increased risk of developing asbestos-related disease as a result of their ingestion of massive amounts of asbestos fibers into their lungs on a daily basis over three years, the Snowmen of Grand Central Terminal can recover damages for the cost of future medical monitoring to ensure the early detection and treatment of any asbestos-related disease they develop.

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STATEMENT OF THE CASE

This case concerns one of the Snowmen of Grand Central Terminal, a handful of 141 railroad workers who were exposed to massive amounts of asbestos fibers while working in the miles of steam tunnels beneath Grand Central Terminal during the late 1980s. They were called Snowmen because every day after working on the old pipe insulation in the tunnels, they would emerge covered from head to toe with white pipe insulation dust [App. 11a; "App." refers to the Appendix in the Petition]. Despite the fact the Railroad knew the insulation was asbestos, for years the Railroad ordered the Snowmen to physically handle and remove the insulation without telling them it was asbestos and without providing them with any protection from the asbestos, in gross violation of OSHA's mandatory regulations for asbestos in the workplace. The Railroad now admits that it knowingly and negligently exposed the Snowmen to the carcinogenic asbestos fibers without warning or protecting them.

The plaintiff respondent Michael Buckley is one of the Snowmen. A pipefitter employed by the defendant Metro-North Commuter Railroad, he is a married 42-year-old father of two with a 10th grade education [JA 447-50; "JA" refers to the Joint Appendix filed with the Second Circuit]. For three years from 1985 to 1988 he was exposed to massive amounts of carcinogenic asbestos fibers on a daily basis, and as a result he now has a significantly increased risk of dying from cancer.

There are only 140 other Snowmen, and the nature of their asbestos exposure is now unique: although such prolonged unprotected exposure occurred prior to 1970, by the late 1980s there were laws and OSHA regulations in place that prevented employers from exposing unprotected workers

to asbestos [JA 252-54]. And indeed, since the OSHA asbestos regulations went into effect in the mid-1970s, there has been no other reported group of workers with the prolonged massive amount of exposure suffered by the Snowmen [JA 254].[1] This action was brought to address the Snowmen's unique situation by providing them with appropriate medical monitoring and an opportunity to obtain just compensation for the Railroad's negligent infliction of emotional distress.

Asbestos fibers are microscopic, needle sharp, and virtually indestructible. When a person inhales air containing asbestos fibers, the fibers form into a longitudinal arrangement parallel with the direction of the wind stream and pass directly into the lungs [JA 113-14]. The fibers are swept into the lungs' tubes and parenchyma, where they impale the tissue and become permanently embedded [JA 140]. The fibers provoke irritation and initiate harmful biological changes in the lung tissue [JA 684-89]. Those changes include the activation of macrophages which attempt to detoxify the embedded asbestos fibers [JA 153-55]. While attempting to engulf the asbestos fibers the macrophages die and release enzymes that further damage the lung tissue [JA 246-51]. Among other things, this process impairs the lungs' ability to clean themselves. Accumulated asbestos fibers also can be carried from the lungs to other parts of the body through the bloodstream or lymphatic system [JA 140].

Asbestos is a known carcinogen that is active in many sites in the human body. It causes mesothelioma (a cancer of the lining of the lungs), lung cancer, and colon cancer, as well as scarring of the lungs [JA 280-81]. Many of these

[1] The Snowmen's exposure is equivalent to the asbestos exposure of shipyard workers during the years of World War II [JA 252-53].

conditions can be beneficially treated if detected early enough through medical monitoring [JA 136; 688-89].

Asbestos-related diseases can bc entirely prevented by controlling the release of asbestos in the workplace or by providing workers with proper protective equipment. Employers who comply with OSHA's workplace asbestos regulations do not expose their employees to any significant amount of asbestos fibers [JA 143; 287; 251; 689].

The Record established that Buckley inhaled massive amounts of asbestos fibers into his lungs on a daily basis over three years [JA 294-97; 305-06; 460-65]. His lung tissue was impaled by the sharp asbestos fibers, damaging the tissue and the ability of his lungs to clean themselves [JA 153-55]. The asbestos fibers also physically contacted his hair, ears, nose, and mouth as well as the skin of his face and hands [JA 460-61].

The expert who testified regarding the degree of Buckley's increased risk, Dr. William J. Nicholson, is the risk assessor the United States Environmental Protection Agency relied on for its asbestos standards, and he also did the risk assessment for OSHA on which OSHA's occupational asbestos exposure standards are based [JA 273; 276-77]. He established that on a daily basis from 1985 to 1988 Buckley was exposed to enormously high concentrations of asbestos fibers "far in excess" of OSHA's Permissible Exposure Limit [JA 304].

In the field of risk assessment, a .001% increased risk of dying is a "highly significant" increased risk that should be eliminated where possible [JA 297-98]. OSHA considers an increased risk of death from asbestos exposure in the workplace of even 1% to be "substantial" and an increased risk of death of 5% to be "totally unacceptable." [JA 276-77]. As a

result of his asbestos exposure, Buckley now has an increased risk of dying from asbestos-related cancer of between 1% to 5%, ranging from "substantial" to "totally unacceptable" and 10 to 50 times greater than "highly significant." [JA 300-02]. As a result of his exposure, his total risk of dying from cancer now has increased by up to 25% [JA 348-49], and his risk of developing pleural scarring and fibrosis has increased by 10% [JA 162; 302-03].

Buckley has a reasonable scientific basis to fear that he will develop a fatal asbestos-related cancer, and that basis will continue for the rest of his life [JA 310-11]. Clinical evidence of asbestos disease does not begin to appear until at least 10 years after the first exposure [JA 263-64]. It is now 10 years since Buckley's first exposure, and his asbestos medical expert recommends that Buckley begin medical monitoring on an annual basis for the rest of his life [JA 167-68; 234-35; 244-46]. Many asbestos diseases can be beneficially treated if detected early enough, and the purpose of the medical monitoring is to detect and treat any asbestos disease as early as possible [JA 230-31; 245-46; 263-64]. The annualized cost of the medical monitoring examinations and tests is $950 [JA 168-70].

Buckley is aware that he has ingested a massive amount of carcinogenic asbestos fibers into his lungs resulting in a significant increased risk of dying from asbestos-related cancer [JA 204; 398]. He is aware that his increased risk will continue for the remainder of his life. He is aware that there is no way to remove the asbestos fibers he has ingested and no way to undo the harmful biological process set in motion by those fibers [JA 487; 513-14]. He is aware that no amount of medication or psychiatric treatment will change this reality [JA 513-14]. In effect, the Railroad has placed a ticking time bomb in his chest which may never go off but which he has to live with for the rest of his life.

Buckley has and will continue to experience for the rest of his life an appropriate level of distress in the form of anger over what the Railroad has done to him and fear of the harmful changes in his body resulting from his massive asbestos exposure. His treating asbestos medical expert, Dr. Stephen Markowitz, confirmed that Buckley has an appropriate degree of fear and concern regarding the long-term effects of his asbestos exposure [JA 266a] . Buckley's anger over what the Railroad has done to him was corroborated by the testimony of his co-workers and by his complaints to his supervisors and to the offices of the MTA Inspector General and the New York Attorney General (which issued a Joint Report confirming the Snowmen's asbestos exposure resulted from Metro-North's violation of OSHA's asbestos regulations) [JA 487-91; 740-50].

REASONS FOR DENYING THE WRIT

Contrary to the Railroad's characterization, this is not a case of "mere exposure" to asbestos that will unleash a "flood of trivial suits" if left undisturbed.[2] The Second Circuit did not hold that "mere exposure" to asbestos is sufficient to recover under the FELA. Rather, the Circuit Court carefully applied this Court's *Gottshall* test to the unique facts of this FELA case and held that Buckley's "massive, lengthy, and tangible" exposure to asbestos fibers resulting in a significant increased risk of death from cancer constitutes a sufficient "physical impact" under *Gottshall* to

[2] Apparently the various amicus curiae are laboring under the misapprehension that this is a case of "mere" or "trivial" exposure to asbestos of the kind experienced by millions of people. The facts in the Record prove otherwise. Indeed, after closely reviewing the Record, the Second Circuit stressed that "Buckley and the other 'snowmen' present what we believe is an unusual case, as Buckley's exposure to asbestos was massive, lengthy, and tangible." [App. 23a].

support a FELA negligent infliction of emotional distress claim [App. 22a-23a].

The Snowmen of Grand Central Terminal's massive prolonged asbestos exposure was a singular aberration, and will never be experienced by any other workers on or off the railroads so long as employers comply with OSHA's mandatory regulations for controlling asbestos in the workplace. This "unusual case" [App. 23a] can have no practical effect beyond the narrow category of the FELA, and even within the FELA it will not expand liability as long as railroads fulfill their legal duty to comply with OSHA's mandatory asbestos regulations.

There is no conflict with the Third Circuit's decision in *Schweitzer*, which preceded this Court's landmark *Gottshall* decision by nine years and which was not even a FELA negligent infliction of emotional distress case. And damages for the costs of future medical monitoring are appropriate given Metro-North's negligent, massive exposure of Buckley to a known carcinogen resulting in his significant increased risk of developing asbestos-related disease.

Metro-North's incantation of a parade of horribles is nothing more than an attempt to divert this Court's attention away from the unique magnitude of the wrong it committed against the 141 Snowmen of Grand Central Terminal, a wrong that will never be repeated as long as employers abide by OSHA's asbestos regulations but which Michael Buckley will have to live with for the rest of his life.

I. THE PRACTICAL EFFECT OF THIS FELA CASE IS CONFINED TO THE UNIQUE FACTS CONCERNING THE SNOWMEN OF GRAND CENTRAL TERMINAL

Metro-North makes the unsupported claim that this case will open the courtroom door to "tens of thousands" of plaintiffs with "extraordinary economic consequences" upon "government and non-government" entities "under other federal statutes and the common law." [Petition at pgs. 6, 12]. This argument has no foundation in reality, and is based on two false premises: that this FELA case constitutes binding precedent on all non-FELA state and federal tort cases; and that the type of massive daily exposure to enormous amounts of asbestos fibers over a three year period resulting in a significant increased risk of death from cancer suffered by the Snowmen of Grand Central Terminal is a common everyday occurrence throughout the nation.

The FELA only applies to a narrow class of railroad workers who are negligently injured on the job. It does not apply to non-railroad workers or to the public at large. *Gottshall* at 2412, 2418. The number of railroad workers who can bring a negligent infliction of emotional distress claim under the FELA is further limited by the test set forth by this Court in *Gottshall*. And a FELA case simply does not apply to or have any precedential effect on state common law cases or on non-FELA federal statutory cases.

The facts of this case are unique, and will never recur as long as employers comply with OSHA's mandatory regulations for controlling asbestos in the workplace. Indeed, neither Metro-North nor Buckley has found a parallel fact situation in any reported cases, state or federal. This is not surprising given that Metro-North's gross violation of OSHA's asbestos regulations at Grand Central Terminal

during the late 1980s was an aberrant episode that even Metro-North has not repeated. The asbestos medical expert confirmed the medical literature does not contain any reports of such massive prolonged exposure occurring since OSHA's asbestos regulations went into effect in the early 1970s. It is not surprising there is a lack of similar fact situations because OSHA's asbestos regulations are designed to eliminate any such exposure and employers are legally obligated to comply with OSHA's regulations.

Where then, will these "tens of thousands" of plaintiffs suing "government and non-government" entities come from? Non-railroad workers are covered by workmen's compensation statutes and are legally barred from suing their employer. Members of the public simply do not have the type of massive direct exposure to asbestos on a daily basis for years at a time that is required to develop a significant increased risk of death from asbestos-related cancer. This FELA case does not even apply to railroad workers unless they have that type of massive prolonged exposure. And employers routinely comply with OSHA's asbestos regulations, completely eliminating any unprotected exposure to asbestos fibers, much less the type of massive prolonged exposure suffered by the Snowmen here.

Any railroad that fulfills its legal duty to comply with OSHA's asbestos regulations has nothing to fear from this case. Conversely, any railroad that grossly violates OSHA's asbestos regulations by subjecting its workers to the type of massive prolonged exposure suffered by the Snowmen of Grand Central Terminal must face the consequences of such egregiously negligent conduct, and deservedly so. Such aberrant behavior has never recurred anywhere else, however. If the importance of a case depends on how many other persons apart from the litigants will be affected, then this case is of no importance at all.

There is no injustice here, for the Second Circuit simply applied *Gottshall* to provide an appropriate remedy for the handful of Metro-North employees who had the singular misfortune of being massively exposed to carcinogenic asbestos fibers on a daily basis over a three year period in gross violation of OSHA's asbestos regulations and who as a result now must live with a significant increased risk of dying from asbestos-related cancer. There can and will be no "flood of litigation" generated by this unusual case.

II. THERE IS NO CONFLICT BETWEEN THIS CASE AND THE THIRD CIRCUIT'S 1985 DECISION IN *SCHWEITZER*

Schweitzer was a pre-*Gottshall* bankruptcy case that did not concern a FELA claim for negligently inflicted emotional distress. The issue decided by *Schweitzer* was "whether plaintiffs, who allege that they were exposed to asbestos prior to their employer's [Bankruptcy Act] reorganization and did not manifest any injury until after the relevant consummation dates, had 'claims' that were discharged in the reorganization proceedings." *Schweitzer* at 941. *Schweitzer* merely followed the obvious rule that a FELA claim for a physically manifested physical injury does not accrue until the physical manifestation occurs. By contrast, this case concerns a post-*Gottshall* FELA negligent infliction of emotional distress claim, which by definition does not involve or require a physically manifested injury. There is no conflict because *Buckley* and *Schweitzer* address two entirely different claims.

Metro-North confuses post-*Gottshall* FELA claims for the negligent infliction of emotional distress (which do not require any manifest physical injury) with more typical FELA claims based on a physically manifested injury. There is a sharp difference between the two types of claims. The classic

FELA claim is for a physical injury that is physically manifest, and naturally such a claim does not accrue until the physical injury becomes physically manifested (the same holds true for occupational disease physical injury claims).

But a post-*Gottshall* FELA claim for the negligent infliction of emotional distress is quite different. It does not require any physical injury at all. In fact, that is what differentiates a FELA claim for negligently inflicted emotional distress: it is a cause of action for emotional distress that accrues even though there is no manifest physical injury ("The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Gottshall* at 2405 [emphasis added]).

The legal issue confronting the Second Circuit in this case was radically different from the bankruptcy issue confronting the Third Circuit in *Schweitzer*. There, the Third Circuit's task was to decide whether non-manifested physical injury claims were dischargeable under the Bankruptcy Act. *Schweitzer* did not address or decide anything regarding a FELA claim for the negligent infliction of emotional distress. Indeed, it was not until nine years later that the standard applicable to such purely emotional distress FELA claims was set forth by this Court's 1994 landmark *Gottshall* decision.

Here, the Second Circuit's task was to apply *Gottshall*'s FELA negligent infliction of emotional distress standard to the unique set of facts concerning the Snowmen of Grand Central Terminal and their massive negligent exposure to asbestos over a three year period resulting in a significant increased risk of death. *Schweitzer* was a case concerning FELA claims for manifest physical injuries, decided at a time

when *Gottshall* did not even exist. *Buckley* is a FELA negligent infliction of emotional distress case controlled by *Gottshall*. There is and can be no conflict between the two.

III. THE SECOND CIRCUIT CORRECTLY APPLIED *GOTTSHALL*'S PHYSICAL IMPACT TEST

In *Gottshall*, this Court for the first time declared the standard to apply to FELA negligent infliction of emotional distress claims: "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Gottshall* at 2406 [emphasis added]. By definition, a negligent infliction of emotional distress claim does not require or involve a manifest physical injury. The focus is on "physical impact" or "risk of physical harm," not on physical injury.

As this Court noted in *Gottshall*, the zone of danger test is less restrictive than the common law physical impact test because it embraces claims based on threatened physical impact as well as on actual physical impact. *Gottshall* at 2410-11. The physical impact test, in other words, is subsumed within the broader zone of danger test. ("The physical impact test, of course, would achieve many of the same ends as the zone of danger test. We see no reason, however, to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur." *Gottshall* at 2411). Metro-North's mistaken reading of the phrase "those within the zone of danger of physical impact," *Gottshall* at 2406, as excluding workers who sustain a physical impact violates common sense: a railroad worker

who actually sustains the physical impact is by definition within the zone of danger of the physical impact.[3]

An application of *Gottshall*'s physical impact test to the facts of this case reveals the following. Metro-North admits that for years it knowingly and negligently exposed the respondent Michael Buckley to carcinogenic asbestos fibers without warning, training, or protecting him. Buckley's body sustained a physical impact from the asbestos fibers, and in particular the needle-like fibers have become embedded in the tissue of his lungs, causing bodily harm and initiating a harmful biological process that cannot be reversed. As a result of that physical impact, Buckley now has a significantly increased risk of dying from asbestos-related cancer. Clearly, Buckley has been physically impacted by the asbestos fibers and now is able to recover for emotional distress caused by his anger over what was done to him and his fear of developing asbestos-related disease and death.

Metro-North simply ignores the fact that this is a FELA negligent infliction of emotional distress case controlled by *Gottshall*'s physical impact standard. Instead, Metro-North pretends this is a run-of-the-mill occupational disease case which requires a physically manifest occupational disease injury in order to be recoverable. But Buckley is not seeking any FELA damages for a physically manifest occupational disease. He merely is seeking recovery under the FELA for negligently inflicted emotional distress resulting from his

[3] Contrary to Metro-North's argument, the law review article quoted by this Court in *Gottshall* did not exclude plaintiffs who sustain a physical impact from the "zone of danger of physical impact" rule. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488-90 (1982).

massive physical impact with asbestos, a known carcinogen, that has significantly increased his risk of dying from cancer.[4]

Moreover, Metro-North completely ignores the leading post-*Gottshall* case relied on by the Second Circuit: *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 727 (1995). *Marchica* also applied *Gottshall*'s physical impact test to an unusual set of facts, and allowed a railroad worker to recover under the FELA for negligent infliction of emotional distress when his hand was pricked by a discarded hypodermic needle under circumstances that would cause a reasonable person to develop a fear of AIDS. In *Marchica*, the Second Circuit thoroughly surveyed the common law concerning emotional distress for fear of developing a future disease in the light of *Gottshall*'s FELA physical impact test, and properly adopted the view most consistent with the FELA's remedial nature: "Thus, a FELA plaintiff who has suffered a physical impact may recover for a fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS." *Marchica* at 1206.

[4] Although Metro-North refers in passing to "claim-splitting" [Petition at pgs. 10-11], Metro-North's failure to raise or address that issue at the trial court or court of appeals levels eliminates it as an issue before this Court ("this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5 (1980)). Nevertheless, the cases relied on by Metro-North -- *Mellon v. Goodyear*, 277 U.S. 335, 344 (1928), and *Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931) -- concerned the right of widows to bring a belated FELA death claim long after the settlement of the underlying FELA physical injury claim, and are inapposite here. A FELA claim for the negligent infliction of emotional distress is separate and distinct from a FELA manifest physical injury claim.

As it did in *Marchica*, the Second Circuit in *Buckley* applied *Gottshall*'s physical impact standard to the unusual facts concerning the Snowmen's massive prolonged daily ingestion of the needle-like carcinogenic asbestos fibers, and properly held that "a jury, presented with the evidence in this case, may find that Buckley suffered an impact that would cause fear in a reasonable person." [App. 23a]. Given the extraordinary circumstances surrounding the Snowmen's massive asbestos exposure, there is nothing erroneous or radical about such a holding. If anything, *Buckley* and *Marchica* merely demonstrate the ongoing ability of this Court's *Gottshall* test to justly resolve a wide variety of unusual fact situations.

IV. THE SECOND CIRCUIT CORRECTLY RULED THAT FELA NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS NEED NOT BE SEVERE WHEN IT RESULTS FROM A PHYSICAL IMPACT WITH BODILY HARM

After reviewing the common law and *Restatement (Second) of Torts*, the Second Circuit found that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact." [App. 24a].[5] It is only where

[5] This is fully consistent with the common law physical impact standard extant since the time the FELA was enacted and incorporated into this Court's *Gottshall* standard. See, for example: *Porter v. Delaware, Lackawanna Western Railroad Co.*, 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eyes sufficient physical impact to allow recovery for fright); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke during apartment fire sufficient physical impact to allow recovery for nervousness and trouble sleeping for several weeks thereafter); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 433-34 (Tenn. 1982) (where defendant negligently permitted carcinogenic chlordane to infiltrate family's household water supply, family members' consumption of water containing chlordane in excess of State Department of Water Quality Control safe limits constitutes sufficient physical impact to allow recovery for anxiety that did not physically manifest itself and was not so severe as to require medical treatment); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 507 N.E. 2d 476, 480-81 (Ohio 1987) (prolonged extensive physical contact with asbestos fibers resulting in increased statistical likelihood of developing asbestos-related cancer sufficient physical impact to allow recovery for increased fear of cancer).

there is no physical impact that the severity of the emotional distress must serve to guarantee the genuineness of the claim. Since Buckley has suffered a physical impact here, he is "entitled to all damages flowing from the impact, including his reasonable emotional distress." [App. 24a]

Metro-North, however, argues that to be recoverable, emotional distress must be so severe as to manifest itself physically ("severe emotional distress is accompanied or followed by shock, illness, or other bodily harm." *Restatement* at Section 46 Comment k). However, Metro-North ignores this Court's own definition of negligently inflicted emotional distress, which specifically states that manifest physical symptoms are not necessary: "The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Gottshall* at 2405 [emphasis added]. Clearly, it is not a prerequisite that FELA negligently inflicted emotional distress be so severe as to manifest itself physically.

Metro-North also ignores another crucial fact controlling this case: Michael Buckley not only has suffered a massive physical impact from the asbestos fibers, he also has suffered and will continue to suffer "bodily harm" in the form of harm to his lung tissue that has set in motion an irreversible harmful biological process. As the *Restatement* confirms, the presence of such "bodily harm" from physical impact entitles

Buckley to recover for his emotional distress with or without a showing of "severe" emotional distress.

It is a basic principle of tort law that when a plaintiff has suffered some "bodily harm" as a result of a defendant's negligent conduct, the plaintiff "is entitled to recover damages for past or prospective bodily harm and emotional distress [and] ... reasonable medical and other expenses." *Restatement* at Section 924. The *Restatement* defines "bodily harm" as "any physical impairment of the condition of another's body." *Restatement* at Section 15. "Impairment" is defined accordingly: "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." *Restatement* at Section 15 Comment a.

The record here establishes that Michael Buckley has suffered "bodily harm" as a result of Metro-North's negligent conduct in exposing him to massive amounts of asbestos fibers on a daily basis over a period of three years. That exposure has caused him to ingest massive amounts of carcinogenic asbestos fibers into his lungs, where they have become impaled and embedded in his lung tissue, altering the structure of the tissue and setting in motion an irreversibly harmful biological process. That is "bodily harm" within the meaning of the *Restatement*.

The Second Circuit correctly read Section 436A of the *Restatement* as not being applicable to the facts of this case. Section 436A is entitled "Negligence Resulting in Emotional Disturbance Alone," and states: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for

such emotional disturbance." [emphasis added]. Section 436A only applies to situations where there is no bodily harm caused by the negligent conduct. That is, it only applies to instances where the negligent conduct does not cause initial bodily harm, but rather only causes emotional disturbance which itself does not generate any bodily harm. Where, as here, the defendant's negligent conduct does produce "bodily harm," the defendant is liable for any emotional disturbance flowing from the negligent conduct even if the emotional disturbance itself does not produce any additional bodily harm (i.e., even if the emotional distress is not "severe").

This is demonstrated by Section 436A's Illustration, which concerns a plaintiff who while eating negligently manufactured cottage cheese finds her mouth full of glass. The entire example is predicated on the fact that the plaintiff "is not cut or otherwise physically injured, and she succeeds in removing the glass without bodily harm." By contrast, if she had suffered some bodily harm from the glass, she then would be entitled to recover for whatever emotional disturbance flows from the negligent conduct, even if the emotional disturbance is not severe, physically manifest, or medically verified.

The fallacy in Metro-North's argument is its failure to acknowledge the fact established in the Record that Buckley has indeed suffered a "bodily harm" that entitles him to recover for whatever emotional disturbances flow from Metro-North's negligent conduct. The Second Circuit was correct in ruling that Buckley, who suffered a negligent physical impact causing bodily harm, does not have to show "severe" emotional distress in order to recover for the emotional disturbances flowing from Metro-North's negligent conduct. This is entirely consistent with *Gottshall*'s physical impact rule and the common law of torts as distilled by the *Restatement (Second) of Torts*.

Metro-North misreads the pre-*Gottshall* *Amendola v. Kansas City Southern Ry. Co.*, 699 F.Supp. 1401 (W.D. Mo. 1988), case as requiring "physical injury" rather than merely some "physical harm." *Amendola* held that "a plaintiff seeking recovery under the FELA for the negligent infliction of emotional distress must introduce evidence that he or she has suffered physical harm as a result of the conduct which caused the emotional distress." *Amendola* at 1410. The *Amendola* court carefully distinguished between "physical injury" and "physical harm," holding that in order to recover for negligently inflicted emotional distress, "physical injury" was not required, only some "physical harm." *Amendola* at 1410-11. Thus *Amendola*'s "physical harm" is synonymous with the *Restatement*'s "bodily harm." There is no conflict between *Amendola* and *Buckley* because the Record here establishes that as a result of Metro-North's negligent conduct Buckley has suffered "bodily or physical harm" within the meaning of both the *Restatement* and *Amendola*.[6]

Metro-North's argument that Buckley's emotional distress is "temporary," "evanescent," and "trivial" [Petition at p. 23] is contradicted by the Record. Although it is uniquely peculiar to Buckley's unusually massive asbestos exposure, the emotional distress stemming from his life-long wait to see if the enormous amount of carcinogenic asbestos fibers he has ingested will blossom into a fatal cancer is not temporary or evanescent or trivial. In effect, Metro-North has placed a ticking time bomb in Buckley's chest, and his understandable

[6] Metro-North's reliance on *Williams v. Carnival Cruise Lines, Inc.*, 907 F.Supp. 403 (S.D. Fla. 1995), is misplaced. *Williams* was a non-FELA and non-Jones Act case decided by a Magistrate Judge. Because there was no physical impact involved and no bodily harm proved, the Magistrate Judge applied Section 436A of the *Restatement* (which only applies to non-physical impact cases). Here, by contrast, there is proof of physical impact and "bodily harm," and Section 436A is inapplicable.

anger, fear, and distress over when and if that time bomb will explode will continue for the rest of his life. Buckley knows there is nothing he can do to remove those carcinogenic fibers from his lungs or to reverse the harmful biological process they have set in motion. All he can do is to wait for a cancer to surface clinically and hope that medical monitoring will detect it early enough to maximize his prognosis. His resulting anger and fear, however, have become an understandably permanent part of his life.

The Second Circuit did require objective evidence of Buckley's emotional distress, and found it in the Record [App. 23a-25a]. Buckley's treating asbestos medical expert confirmed that Buckley exhibited an appropriate degree of anger and concern over his massive exposure and significantly increased risk of death by cancer. The amount of objective evidence was "slim" only because the trial court improperly limited Buckley from introducing evidence establishing the full basis and context of his emotional distress [Plaintiff's Second Circuit Brief at pgs. 25-27], and the retrial will allow a fuller record to be developed.

The Second Circuit was careful to note that speculative or frivolous claims will be avoided by application of the test used in *Marchica*, namely whether the impact would cause fear in a reasonable person: "To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." [App. 21a]

This standard is not, as Metro-North argues, "inherently imprecise and unworkable." [Petition at p. 10]. For example, OSHA's asbestos regulations contain a Permissible Exposure Limit for asbestos fibers beyond which workers cannot safely

be exposed. Where, as here, the Record establishes that a railroad worker has been exposed to carcinogenic asbestos fibers "far in excess" of OSHA's Permissible Exposure Limit every day for three years, there is a sufficient objective basis for a reasonable person to fear developing asbestos disease. By contrast, exposure below OSHA's Permissible Exposure Limit would not cause a significant increased risk and not provide a basis for fear in a reasonable person.

The reasonable person test applied by the Second Circuit in *Marchica* and *Buckley* allows the unique nature of asbestos exposure and disease to be taken into account while screening out any speculative or frivolous claims based on "mere" or "trivial" exposure to asbestos without significant increased risk. Here, the Second Circuit reviewed the Record and properly found that "Given the evidence of Buckley's prolonged and pronounced exposure to asbestos, a jury may find that he suffered an impact that would cause fear in a reasonable person." [App. 21a].

V. THE SECOND CIRCUIT CORRECTLY RULED THAT MEDICAL MONITORING COSTS ARE AN APPROPRIATE ELEMENT OF DAMAGES IN THIS CASE

As the Second Circuit noted, the recovery of reasonable medical expenses flowing from a defendant's negligent conduct has always been an element of common law and FELA tort law. The *Restatement (Second) of Torts* confirms that a tort plaintiff who has suffered negligently inflicted "bodily harm" is "entitled to recover damages for past or prospective ... reasonable medical and other expenses." *Restatement (Second) of Torts* at Section 924.

For a medical monitoring claim, the "injury" is the fact the plaintiff suffered a significant negligent exposure to a

proven toxic substance, resulting in a significant increased risk of contracting a serious latent disease that makes periodic diagnostic medical examinations and testing reasonably necessary and beneficial. *In Re Paoli R.R. PCB Litigation*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied*, 499 U.S. 961, 111 S.Ct. 1584 (1991) [*Paoli* I], 35 F.3d 717, 787 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 1253 (1995) [*Paoli* II]. Because it is a plaintiff's significant exposure to a proven hazardous substance that justifies the need for medical monitoring, proof of a present or future physical injury is not a prerequisite for a medical monitoring claim.

Metro-North ignores the fact that this Court twice has declined to alter the standard for medical monitoring claims set forth in the *Paoli* cases. Indeed, Metro-North fails to address or even cite the *Paoli* cases, the leading precedent in the field, or the various common law cases upholding medical monitoring claims cited and discussed by the Second Circuit. [App. 26a-27a]. The Circuit Court in *Paoli* was not concerned about provoking a flood of medical monitoring claims because only claims based on significant exposure with significant increased risk are allowed and because the cost of medical monitoring is not high. *Paoli* II at 788.

Here, the respondent Michael Buckley satisfies each of the elements for a medical monitoring claim. Metro-North admitted that it negligently exposed Buckley to asbestos, a known carcinogen, for many years. The medical experts established that Buckley was exposed to a massive amount of asbestos on a daily basis for several years and as a result has a significant increased risk of developing asbestos-related diseases. The experts also confirmed that those diseases can be treated beneficially if caught early enough through periodic medical testing and examinations. The annualized cost of such medical monitoring for Buckley is $950.

There is no question that Buckley has suffered bodily harm from his negligent ingestion of massive amounts of carcinogenic asbestos fibers. The needle-like fibers have embedded themselves in his lung tissue, damaging the tissue and initiating a harmful biological process that is irreversible. Such toxic exposure with bodily harm producing significant increased risk of disease is a sufficient basis for recovery of medical monitoring costs. Indeed, the whole point of medical monitoring is to provide an early warning of illness that may develop as a result of significant toxic exposure, and thus a current diagnosed disease or physical injury is not required.

Michael Buckley is precisely the type of plaintiff who can benefit from medical monitoring: he has had a significant exposure to asbestos with a significant increased risk of developing asbestos-related diseases, but he has not yet developed a clinically diagnosed asbestos disease and can benefit from the early detection and treatment of any such disease. The Second Circuit was correct in ruling there is a reasonable basis for a medical monitoring claim in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
OCT 8 1996
CLERK

No. 96-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THIS CASE WILL AFFECT THE RESOLUTION OF MANY OTHER CASES UNDER BOTH FELA AND THE COMMON LAW

In his opposition brief, plaintiff-respondent ("plaintiff") asserts that this is a case of little precedential value because it is a FELA case and because plaintiff's asbestos exposure, based on the Second Circuit's characterization of it as "massive" and "unusual," was "unique." *See* Resp. Br. at 5-9. Yet, the "massive" exposure standard adopted by the Second Circuit and urged by plaintiff does not impose any meaningful constraints upon claims for emotional distress, as this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2408-10 (1994), requires.[1]

The term "massive" exposure is not, as plaintiff seems to believe, a quantifiable or objective standard by which to limit liability. The only guidance the Second Circuit provides is to distinguish "massive" exposure from everyday exposure to asbestos in the "ambient air." (A-20) Thus, "massive" exposure becomes any exposure to asbestos at some indeterminate level above normal background levels. Such an ill-defined standard potentially renders every workplace exposure a "massive" one.[2]

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[1] Because the District Court directed a verdict for Metro-North at the close of plaintiff's case, no ultimate findings of fact were made. In any event, the Second Circuit's creation of a "massive" exposure standard for claims of emotional distress is simply incorrect. Under *Gottshall*, such claims are cognizable under FELA only if they meet the common law zone of danger test -- which plaintiff's claims in this case do not. *See* Point II of Metro-North's Petition and Point II *infra*.

[2] Plaintiff attempts to supply a definition of "massive" exposure by referring repeatedly to OSHA standards regarding asbestos exposure. Yet, the Second Circuit's decision, which is the subject

Moreover, contrary to plaintiff's assertions, the fact that this is a FELA case does not mean that the Second Circuit's decision is unimportant or of narrow applicability. As the American Association of Railroads ("AAR") observes in its *amicus* brief, since 1990 more than 14,000 new asbestos personal injury cases have been filed under FELA against American railroads. *See* AAR Br. at 7-8. Furthermore, the decision will inevitably be cited as precedent by FELA plaintiffs alleging exposure to a host of other substances. *See id.* at 9 ("Since 1990, over 2000 FELA claims have been filed against railroads alleging exposure to other toxic substances."). Thus, even as to FELA cases, the importance and precedential value of the Second Circuit's decision extend far beyond the cases of this plaintiff and his co-workers.

Plaintiff also argues that this FELA case is of little importance because it is not "binding precedent" in common law or other cases. *See* Resp. Br. at 7. This argument ignores the fact that, in deciding issues of state common law, federal and state courts routinely look to FELA decisions because FELA decisions analyze and apply common law principles. For example, this Court's 1994 opinion in *Gottshall* has already been cited in a number of state court opinions applying the zone of danger test under the common law.[3] Similarly, *Urie v. Thompson*, 337 U.S. 163 (1949), and *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d

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of this certiorari petition, never refers to those OSHA standards, which do not in any event purport to set a legal threshold for emotional distress claims.

[3] *See, e.g., Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. Ct. App. 1994); *Kraszewski v. Baptist Medical Ctr.*, 916 P.2d 241, 246 n.10 (Okla. 1996); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995).

Cir.), *cert. denied*, 474 U.S. 864 (1985), have been cited numerous times by federal and state courts in common law cases.[4] Clearly, if the Second Circuit's opinion is allowed to stand, federal and state courts will look to it in deciding claims asserted under state common law as well as under state and federal statutes. In fact, in construing FELA in this case, the Second Circuit expressly purported to apply "common-law principles." (A-16) That the Second Circuit's decision is not *binding* except in FELA cases does not negate the importance of the decision and the influence it is likely to exert.

Nor is the precedential value of the Second Circuit's decision limited, as plaintiff contends, because plaintiffs covered by FELA may sue their employers for injuries caused by the employer's negligence, while other workers are restricted to worker's compensation. *See* Resp. Br. at 8. Such other workers can and routinely do sue manufacturers, suppliers, and others for injuries caused by exposure to asbes-

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[4] *See, e.g., Bendix Corp. v. Stagg*, 486 A.2d 1150, 1152 (Del. 1984) (citing *Urie*); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497, 499-500 (Ky. 1979) (same); *Burns v. Jacquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (following *Schweitzer*), *review dismissed per stipulation*, 781 P.2d 1373 (Ariz. 1989); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 543 (Me. 1986) (same); *Giffear v. Johns-Manville Corp.*, 632 A.2d 880, 886 (Pa. Super. Ct. 1993) (same), *aff'd sub nom. Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 n.8 (D. Haw. 1990) (Hawaii law) (same).

tos.[5] The Second Circuit's opinion will undoubtedly be relied upon by plaintiffs in such cases.

Plaintiff also improperly attempts to minimize the importance of this case by arguing that asbestos exposure has become a rare event. *See* Resp. Br. at 7-8. The reality is, however, that asbestos remains present in the nation's schools, homes, office buildings, factories, and public edifices. People repairing, renovating, demolishing, or removing asbestos from buildings will undoubtedly at times be exposed to significant levels of asbestos.[6] Such exposures will in all probability give rise to suits such as the instant one. Moreover, the Second Circuit's decision in this case will be looked to as precedent not only in new exposure cases, but also, because of the long latency period for asbestos-related disease, in the huge numbers of asbestos cases still being filed stemming from earlier exposures.

II. THE ZONE OF DANGER TEST DOES NOT SUBSUME THE PHYSICAL IMPACT TEST

In his brief, plaintiff argues that the zone of danger test adopted by this Court in *Gottshall* "subsumes" the old "physical impact" test. *See* Resp. Br. at 11. This argument is based on an untenable reading of this Court's opinion in

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[5] Approximately 37,000 asbestos personal injury cases are now pending in the federal court system. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. 2 MDL 875, 1996 WL 239863, at *1 (E.D. Pa. May 2, 1996). As of 1992, an estimated additional 130,000 asbestos cases were pending in state courts. *See* W. W. Schwarzer, et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1529, 1530 (1995).

[6] *See, e.g.*, W. Keith C. Morgan & Anthony Seaton, *Occupational Lung Diseases* 315 (1995); W. Raymond Parkes, *Occupational Lung Disorders* 415 (3d ed. 1994).

Gottshall. In *Gottshall*, this Court considered three possible tests for emotional distress claims and chose one of those tests -- the zone of danger test. *See Gottshall*, 114 S. Ct. at 2410-11. Plaintiff's argument that, in adopting the zone of danger test, this Court also adopted the physical impact test is not supported by the language or logic of the decision. *See* Metro-North's Petition at 18-20. Nor is it supported by the myriad cases applying the zone of danger test under the common law. These cases simply do not interpret the zone of danger test to include a separate physical impact test that has nothing to do with the zone of danger.

Moreover, plaintiff's assertion that any person who sustains some kind of physical impact is by definition in the zone of danger is erroneous. *See* Resp. Br. at 11-12. This argument could apply only where the facts of the case demonstrate that a zone of danger -- *i.e.*, a "location in which the plaintiff is at 'immediate risk of physical harm'" -- existed. *See Garcia v. Burlington N. R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (citation omitted). In this case, there was no zone of danger of *immediate* physical harm, and there can be no recovery under the zone of danger test.[7]

Indeed, plaintiff does not support his argument with any decision from any court that either explicitly or implicitly

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[7] Furthermore, contrary to plaintiff's assertion (Resp. Br. at 12 n.3), Metro-North does not argue that the zone of danger test *excludes* plaintiffs who sustain a physical impact. Rather, because "[w]hether the plaintiff has suffered an impact bears little relationship to the [emotional] harm," the zone of danger test treats impacted and unimpacted plaintiffs alike: both must be in the zone of danger of immediate physical injury to recover. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982).

interprets the zone of danger as subsuming the physical impact test. *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995), upon which plaintiff relies, does not support such a reading of *Gottshall*. In *Marchica*, the plaintiff was in fact in a zone of danger of immediate physical injury and felt contemporaneous fear of immediate physical injury -- infection with the AIDs virus, which, once contracted, is nearly always fatal. Simply put, *Marchica* did not do away with the traditional common law elements of the zone of danger test.[8]

III. THE SECOND CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT'S DECISION IN *SCHWEITZER*

Plaintiff claims that the Second Circuit's decision does not conflict with the Third Circuit's decision in *Schweitzer*, ignoring the Second Circuit's explicit acknowledgement of that conflict. (A-20 to A-21) Plaintiff mistakenly asserts that no conflict exists because this is an emotional distress case and *Schweitzer* was a physical injury case. *See* Resp. Br. at 9. Contrary to plaintiff's assertions, the *Schweitzer* rule that a plaintiff exposed to asbestos has no cause of action until he develops an asbestos-related disease properly governs this

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[8] Moreover, in *Marchica*, the plaintiff had been "stabbed" by a hypodermic needle, a co-worker saw blood coming from the plaintiff's "puncture wound," 31 F.3d at 1200, and the plaintiff's "emotional distress was the direct result of a documented physical injury." *Id.* at 1204. Later case law on hypodermic needle punctures applies traditional tort law principles allowing emotional distress damages flowing from a physical injury. *See, e.g., Murphy v. Abbott Labs.*, 930 F. Supp. 1083, 1085-87 (E.D. Pa. 1996) (nurse stuck by needle used on AIDS patient could recover for emotional distress flowing from physical injury; distinguishing asbestos exposure cases).

emotional distress case. Under *Gottshall*, claims for emotional distress, in the absence of physical injury, are cognizable under FELA only when they meet the zone of danger test. As discussed in Point II of Metro-North's Petition, this asbestos exposure case does not meet the zone of danger test. Therefore, the fact that under *Schweitzer* plaintiff has no physical injury is, as a matter of law, dispositive of his emotional distress claims. Thus, the result reached by the Second Circuit in this case is directly opposed to the result that *Schweitzer* would compel.

Plaintiff's claim that *Schweitzer* is inapplicable because it was a bankruptcy case misses the point. In order to resolve the bankruptcy issues in that case, the *Schweitzer* court had to determine, based on "generally applicable principles of tort law," when an asbestos claimant has a cognizable injury under FELA. *Schweitzer*, 758 F.2d at 941-42. Indeed, *Schweitzer's* rule that an asbestos plaintiff has no cause of action until he manifests an asbestos-related disease has been repeatedly followed in non-bankruptcy cases involving emotional distress claims. *See* cases cited *supra* at n.4 and in Metro-North's Petition at 8 & n.6.

IV. PLAINTIFF HAS NOT SUSTAINED "BODILY HARM," AND, IN ANY CASE, BODILY HARM CANNOT SUPPORT DAMAGES FOR NON-SEVERE EMOTIONAL DISTRESS

Plaintiff argues that, although he has no "physical injury," he has "bodily harm," which justifies recovery of damages for his admittedly non-severe emotional distress. *See* Resp. Br. at 14-16. The authorities cited by plaintiff do not support his

false distinction between bodily harm and physical injury.[9] Other than the Second Circuit, no court, even those cited by plaintiff, has allowed damages for non-severe emotional distress unless such damages flow from a physical injury or another independent tort. *See* Petition at 24.

Plaintiff incorrectly relies upon the Restatement (Second) of Torts to argue that he has suffered "bodily harm." Under the Restatement, "bodily harm" is defined as a "physical *impairment* of the condition of another's body, or physical pain or illness." Restatement § 15 (emphasis added). As used in the Restatement, the term "'harm' implies a loss or detriment to a person, and not a mere change or alteration ." *Id.* § 7 cmt. b. Only a physical change that is detrimental constitutes a bodily harm. *Id.*

Under these principles, it is clear that plaintiff has sustained no bodily harm. It is undisputed that plaintiff here has no asbestos-related disease or illness. X-rays of his lungs show no pleural plaques or thickening and no traces or effects whatsoever of asbestos exposure. (A-13) Indeed, even where a plaintiff has pleural thickening or scarring, courts have held that, unless actual impairment or symptoms are present, such scarring and thickening are merely changes or alterations that do not constitute bodily harm or compensable physical injury within the meaning of the Restatement. *See, e.g., Simmons v. Pacor, Inc.*, 674 A.2d 232, 236-37 (Pa.

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[9] Plaintiff seems to suggest that "bodily harm" is some lesser degree of harm than a "physical injury." The difference between the two terms as they are used in the Restatement (Second) of Torts is that "physical injury" is a legal term, whereas "bodily harm" is a factual term. In the Restatement, a physical injury is a bodily harm caused by the "invasion of any legally protected interest." *See* Restatement (Second) of Torts § 7 (1965).

1996) (citing cases); *see also Schweitzer*, 758 F.2d at 942 (subclinical changes from asbestos exposure do not constitute the "actual loss or damage . . . required to sustain a cause of action under generally applicable principles of tort law"); *accord, Burns*, 752 P.2d at 30-31; *Bernier*, 516 A.2d at 543; *Giffear*, 632 A.2d at 886-87; *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1567-68.[10]

Moreover, even if plaintiff were correct in his assertion that he has "bodily harm," that "bodily harm" would not entitle him to damages for non-severe emotional distress. Plaintiff incorrectly relies upon section 924 of the Restatement to support this argument. *See* Resp. Br. at 16. In fact, section 924 does not purport to change the basic rule of tort law that a plaintiff may not recover damages in the absence of an injury. *See* Restatement § 902 & cmt. a ("Damages flow from an injury."). Plaintiff here has no physical injury to support emotional distress damages. In sum, plaintiff's argument that an alleged "bodily harm" entitles him to damages for emotional distress that was admittedly non-severe is without basis in law or fact.

V. FELA FORBIDS MEDICAL MONITORING DAMAGES ABSENT PHYSICAL INJURY

Plaintiff also argues that section 924 of the Restatement (Second) of Torts authorizes medical monitoring damages

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[10] *See also In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 239863, at *3; *Caputo v. Boston Edison Co.*, Civ. A. No. 88-2126-Z, 1990 WL 98694, at *4 (D. Mass. July 9, 1990), *aff'd*, 924 F.2d 11 (1st Cir. 1991); *Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761, at *1 (N.D. Ill. May 9, 1986). Moreover, contrary to plaintiff's contentions, *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401, 1406-07 (W.D. Mo. 1988), supports Metro-North's position.

based upon his alleged "bodily harm." *See* Resp. Br. at 20. As discussed above, plaintiff has no "bodily harm," and his reliance on section 924 is misplaced.

Furthermore, plaintiff does not even address FELA's statutory injury requirement. Instead, plaintiff cites the Third Circuit's two decisions in *In Re Paoli Railroad Yard PCB Litigation,* 916 F.2d 829 (3d Cir. 1990), *cert. denied,* 499 U.S. 961 (1991), and 35 F.3d 717 (3d Cir. 1994), *cert. denied,* 115 S. Ct. 1253 (1995), in which the court predicted that Pennsylvania law would allow medical monitoring damages in the absence of physical injury. These are not FELA cases and do not address a statutory injury requirement. In addition, their validity has been severely undermined by the Pennsylvania Supreme Court's decision in *Simmons v. Pacor, Inc.,* 674 A.2d 232 (Pa. 1996). Recent federal district court decisions have "read the *Simmons* decision as holding that mere exposure to significant levels of asbestos, without a demonstrable physical consequence such as pleural thickening, does not support a claim for medical monitoring." *Fried v. Sungard Rec. Servs.,* 1996 WL 520404, at *2 (E.D. Pa. Sept. 12, 1996); *see also Fried v. Sungard Rec. Servs.,* 925 F. Supp. 375, 377 (E.D. Pa. 1996).

CONCLUSION

The Court should grant certiorari in this case.

Respectfully Submitted,

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MOTION FILED
SEP 27 1996

No. 96-320

(3)

In The

Supreme Court of the United States

October Term, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, Consolidated Rail Corporation respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief; however, the respondent has refused to provide consent.

Consolidated Rail Corporation ("Conrail") is a privately-held corporation that is owned by Conrail, Inc., its publicly-held parent corporation.

Prior to this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), Conrail, like other United States railroads, had been subject to a proliferation of claims for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"), and had become increasingly concerned with the disparate treatment that these claims received in the courts. The potential for almost unlimited liability increased dramatically with the decisions of the Court of Appeals for the Third Circuit in *Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355 (3d Cir. 1993), and *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1993).

The Third Circuit's decisions in *Gottshall* and *Carlisle*, like the decision of the Court of Appeals for the Second Circuit in *Buckley v. Metro-North Commuter Ry. Co.*, 79 F.3d 1337 (2d Cir. 1996), expanded liability for emotional distress damages under the FELA to an unprecedented degree and made virtually any emotional distress claim cognizable. The Third Circuit's decisions also illustrated

the deep and irreconcilable conflicts among the circuits with respect to recovery for negligent infliction of emotional distress under the FELA.

This Court granted Conrail's petition for a writ of certiorari in *Gottshall* and *Carlisle* and reversed. Consistent with the FELA's purpose to protect railroad workers from the physical dangers of railroading and consistent with the admonitions of this Court that the FELA should follow the common law, in *Gottshall* the Court established a clear, bright line test for the recovery of damages for negligent infliction of emotional distress under the FELA – the common law zone of danger test. The Second Circuit's decision in *Buckley* represents a profound misapplication of the *Gottshall* zone of danger test, one that will have enormous consequences for the railroad industry.

In view of its great familiarity with the issue, its belief that the *Buckley* decision is in utter and irreconcilable conflict with *Gottshall*, its abiding concern that the zone of danger test be correctly applied in the lower courts, and its personal experience with the enormous costs of litigating non-meritorious emotional distress claims, Conrail respectfully requests that it be allowed to

participate in this case and to file the attached brief *amicus curiae* in support of petitioner.

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Dated: September 27, 1996.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* Consolidated Rail Corporation is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

As established by this Court in *Gottshall*, the zone of danger test compensates railroad workers whose emotional distress stems from their fear of imminent physical injury from an accident or some other immediate physical impact, and denies recovery for emotional distress that arises from a more generalized, less immediate fear. The zone of danger test has proven to be fair, workable, and easy for the lower courts to apply. The Second Circuit's decision in *Buckley* is in fundamental conflict with *Gottshall* because it permits recovery for emotional distress in the absence of any physical injury, any risk of imminent physical injury, or any fear of imminent physical injury.

The Second Circuit's decision in *Buckley* eviscerates the bright line rule established by this Court in *Gottshall*, expands the zone of danger test far beyond its common law roots, permits recovery for a broad range and vast numbers of claims that would not be cognizable under the common law, and, in so doing, returns the FELA to its pre-*Gottshall* state, in which there existed no clear

guidelines for the lower courts in their consideration of FELA negligent infliction of emotional distress claims.[1]

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GOTTSHALL* BECAUSE BUCKLEY'S OCCUPATIONAL EXPOSURE CLAIM DOES NOT SATISFY THE *GOTTSHALL* ZONE OF DANGER TEST.

In *Gottshall*, this Court adopted the bright line zone of danger of physical impact test for negligent infliction of emotional distress claims under the FELA. The Court described the test as follows:

> [A] worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting [FELA] of alleviating the physical dangers of railroading.

Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2410-11 (1994). Quoting one of the leading law review articles advocating the zone of danger test for negligent infliction

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[1] For a comprehensive analysis of the far-reaching implications of the Second Circuit's decision in *Buckley* on the railroad industry, see the *amicus curiae* brief of the Association of American Railroads filed in support of petitioner.

of emotional distress claims, the Court explained that " 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.' " *Id.* at 2406 (quoting Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 489 (1982)).

In addition, this Court stressed in *Gottshall* that the bright line zone of danger of physical impact test was necessary because, unlike claims for physical injuries that present objective, identifiable harms, without clear principles defining when a claim is cognizable, emotional distress claims present "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 2411. As the Court explained: " 'The geographic risk of physical impact caused by the defendant's negligence in most cases is quite limited, which accordingly limits the number of people subjected to that risk. There is no similar finite range of risk for emotional harm.' " *Id.* at 2405 n.4 (quoting Pearson, *supra*, 34 U. FLA. L. REV. at 507).

Significantly, in adopting the zone of danger of physical impact test, the Court made clear that emotional distress claims arising from general working conditions are not cognizable under the FELA. In the Court's view, permitting a cause of action for an employee's emotional reaction to his or her working conditions "would tend to make railroads the insurers of the emotional well-being and mental health of their employees." *Id.* at 2409.

Buckley's claim does not satisfy the clear lines for recovery for negligent infliction of emotional distress under the FELA as established by this Court in *Gottshall*. It is undisputed that Buckley neither experienced a physical injury nor feared imminent physical injury from an impact. Buckley never asserted that he experienced a physical injury. In any event, under this Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949), occupational diseases, such as silicosis or asbestosis, give rise to compensable injuries under the FELA only if and when adverse physical effects of the disease are manifested. *See also Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) (exposure to asbestos, without asbestos-related physical injury, does not constitute basis for recovery under FELA), *cert. denied*, 474 U.S. 864 (1985). Buckley did not fear imminent physical injury because his risk of developing disease certainly was not imminent, and, in any case, was minimal.

The Second Circuit held, however, that Buckley experienced a "physical impact" sufficient to satisfy the zone of danger test. The Court identified that "physical impact" as Buckley's exposure to asbestos. *See Buckley v. Metro-North Commuter Ry. Co.*, 79 F.3d 1337, 1343 (2d Cir. 1996). Yet, as the Court acknowledged, and as Buckley's own doctors testified, that "impact" did not result in any physical injury or in any clinical manifestation of asbestos exposure, and gave rise to at most a minimal increased risk that Buckley would develop an asbestos-related illness. *See id.* at 1343-44 ("we think a reasonable jury could find that Buckley suffered a physical impact from large amounts of asbestos fibers despite the lack of clinical proof of asbestos exposure"). Accordingly, the most that

can be said about the "physical impact" that the Second Circuit used to justify Buckley's recovery for emotional distress is that it consisted of an environmental condition that did not manifest itself in physical injury, that did not place Buckley at risk of imminent physical injury, and that did not cause him to fear imminent physical injury.

Exposure to environmental conditions, such as substances in the air, does not satisfy the zone of danger test because it involves neither a "physical impact" nor an "imm diate risk of physical harm." *Gottshall*, 114 S. Ct. at 2406; *see Garcia v. Burlington Northern Ry. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is 'at immediate risk of physical harm' ") (citations omitted); *McMillan v. National Ry. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (plaintiff not in zone of danger when near worker who had punched other workers because "threat of injury" to plaintiff "was not immediate" but was "both speculative and remote"); *see also Outten v. National Ry. Passenger Corp.*, 928 F.2d 74, 78-79 (3d Cir. 1991) (railroad worker outside zone of danger – a mile away from train collision – could not recover for fright and emotional distress); *cf. Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996) ("cases which base recovery upon an 'impact' rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to [another]" and "are not analogous" to asbestos exposure cases where "no physical injury to any party has been established") (citations omitted).

That Buckley's exposure to asbestos does not satisfy the zone of danger test is clear not only from the express terms of this Court's opinion in *Gottshall*, but also from

the Third Circuit's decision on remand, in which the Court rejected Gottshall's argument that his exposure to extreme heat constituted the requisite "physical impact" under the zone of danger test. As the Third Circuit explained (while not reaching the precise issue of asbestos exposure because it was not before the Court), "[i]f the sun's rays and heated air constitute physical impacts, then many work place situations could give rise to an impact within the meaning of the test.[ ] Such an encompassing definition of impact would undercut the Court's desire to draw reasonable limits to employer liability for emotional distress claims." *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530, 535 (3d Cir. 1995), *on remand from* 114 S. Ct. 2396 (1994). At its core, Buckley's claim is nothing more than a variation on Gottshall's.

In short, if the *Buckley* decision is permitted to stand, the clear limits and finite range of the zone of danger test will be lost, and the rule of law established will be equivalent to that expressly rejected by this Court in *Gottshall*. Indeed, the only limit under the Second Circuit's decision in *Buckley* on the recovery of damages for emotional distress arising out of occupational exposure is that the worker's exposure be "massive, lengthy, and tangible." *Buckley*, 79 F.3d at 1345. But this Court's adoption of the zone of danger test in *Gottshall* expressly was predicated on the Court's rejection of such subjective types of standards and of the concomitant subjecting of defendants to "unpredictable and nearly infinite liability." *Gottshall*, 114 S. Ct. at 2408-09; *see also id.* at 2409 (warning that under such fact-specific tests, "[j]udges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional

injury, which are far less susceptible to objective medical proof than are their physical counterparts").

Moreover, if there was any question about whether mere exposure to asbestos – with no physical injury, no risk of imminent physical injury, and no fear of imminent physical injury – is a sufficient "impact" under the zone of danger test to give rise to an FELA emotional distress claim, this Court's precedent establishes that the Second Circuit should have given "great weight," *id.* at 2404, to the common law courts' resolution of this issue. Instead, however, as next discussed, the Second Circuit expressly rejected the virtually uniform common law precedent prohibiting recovery for negligent infliction of emotional distress based on occupational exposure in the absence of physical injury or the likelihood that the plaintiff will develop a disease.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *GOTTSHALL* BECAUSE THE SECOND CIRCUIT DISREGARDED THE COMMON LAW PRECEDENT PROHIBITING RECOVERY FOR EMOTIONAL DISTRESS BASED ON OCCUPATIONAL EXPOSURE IN THE ABSENCE OF PHYSICAL INJURY OR THE LIKELIHOOD THAT THE PLAINTIFF WILL DEVELOP A DISEASE.

In determining that the common law zone of danger best reflects the purposes of the FELA, the Court looked "to FELA itself, its purposes and background, and the construction we have given it over the years." *Gottshall*, 114 S. Ct. at 2403. Moreover, the Court emphasized that

"because 'FELA jurisprudence gleans guidance from common-law developments,' [the Court] must consider the common law's treatment of the right of recovery asserted by respondents." *Id.* (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 (1987)). As the Court explained, "although common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Gottshall*, 114 S. Ct. at 2404.

Under the common law, "impact" for purposes of the zone of danger test is a "violent physical contact, a striking together, a collision." *Williams v. Baker*, 572 A.2d 1062, 1064 n.8 (D.C. 1990); *see also Mitchell v. Hadl*, 816 S.W.2d 183, 184 (Ky. 1991) ("physical contact"); *OB-GYN Assocs. v. Littleton*, 386 S.E.2d 146, 148 (Ga. 1989) ("actual bodily contact"). Thus, common law courts applying the zone of danger test generally permit only those plaintiffs involved in or threatened with traumatic impact-producing accidents to recover for emotional distress. *See, e.g., Dobelle v. National Ry. Passenger Corp.*, 628 F. Supp. 1518, 1521, 1525 (S.D.N.Y. 1986) (fifteen-foot section of steel rail that struck and penetrated passenger train); *Keck v. Jackson*, 593 P.2d 668, 668-70 (Ariz. 1979) (automobile accident); *Towns v. Anderson*, 579 P.2d 1163, 1165 (Colo. 1978) (*en banc*) (gas explosion that lifted house off its foundation); *see also Niederman v. Brodsky*, 261 A.2d 84, 90 (Pa. 1970) (plaintiff may recover for emotional distress under zone of danger theory only if he "was in personal danger of physical impact because of the direction of a negligent force against him and [he] actually did fear the physical impact").

Where there is no such obvious impact or threat of impact, common law courts generally do not permit recovery for emotional distress under the zone of danger test. *See, e.g., Kutner v. Eastern Airlines, Inc.*, 514 F. Supp. 553, 559 (E.D. Pa. 1981) (plaintiffs forced to drive home in dangerous weather conditions because of alleged negligence of airline did not state claim for negligent infliction of emotional distress under zone of danger test because there was no "allegation that [the airline] created any negligent force that threatened [them] with a danger of physical impact"); *Lewis v. Westinghouse Elec. Corp.*, 487 N.E.2d 1071, 1072 (Ill. App. Ct. 1985) (although plaintiff in stalled elevator feared danger of suffocation and serious physical harm, she could not recover under zone of danger of test because elevator was merely stalled and she was not at "high risk of physical impact").[2]

In accordance with these principles, the common law cases make clear that occupational exposure does not

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[2] Courts have reached similar conclusions under the common law bystander test, which permits a plaintiff to recover for emotional distress caused by witnessing an injury to a close relative, even if the plaintiff was not within the zone of danger. *See Plummer v. Abbott Labs.*, 568 F. Supp. 920, 924 (D.R.I. 1983) (rejecting plaintiff's argument that bystander rule allowed recovery for emotional distress of DES mothers caused by apprehension that children would develop future medical problems because "there was no episodic single incident to be witnessed; there was merely the insidious development – or, as to many of the targeted plaintiffs, only the threatened development – of a disease process"); *Jansen v. Children's Hosp. Medical Ctr.*, 31 Cal. App.3d 22, 24 (1973) (witnessing gradual decline and death of daughter due to alleged malpractice did not meet bystander test because there was no "sudden and brief event").

satisfy the zone of danger test because there is no traumatic accident, no immediate physical injury, no fear of imminent physical injury, and no imminent risk of disease. Indeed, every common law zone of danger case of which Conrail is aware has rejected recovery for occupational exposure, in the absence of physical injury or imminent risk of disease. *See, e.g., Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 592 (5th Cir. 1986) (Louisiana law); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (Pennsylvania law); *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983), *aff'd*, 480 A.2d 647 (Del. 1984) (Delaware law).

Indeed, whether applying the zone of danger or any other test, federal and state courts applying state common law are virtually unanimous in holding that occupational exposure such as that at issue here, without present physical injury or the likelihood of developing a disease in the future, cannot support a claim for negligent infliction of emotional distress. *See, e.g., Ball v. Joy Techs., Inc.*, 958 F.2d 36, 38 (4th Cir.) (Virginia and West Virginia law) (no recovery for negligent infliction of emotional distress because "mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle plaintiffs to recover for their emotional distress"), *cert. denied*, 502 U.S. 1033 (1992); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (New Jersey and Pennsylvania law) (no recovery for negligent infliction of emotional distress absent physical injury caused by asbestos exposure or physical manifestation of the feared disease); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (no cause of action for emotional distress based on asbestos exposure in the

absence of actual compensable harm); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988) (requiring present PCB-related injury as predicate to recovery for mental anguish arising from exposure to PCBs), *aff'd*, 872 F.2d 422 (9th Cir. 1989); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (no recovery for emotional distress and fear of cancer for plaintiffs with no asbestos-related disease, because "[j]ustice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease"), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (in asbestos exposure case, present physical injury required in order to state claim for mental anguish); *Doner v. Ed Adams Contracting, Inc.*, 617 N.Y.S.2d 565, 566 (App. Div. 1994) (denying recovery for emotional distress to asbestos-exposed plaintiff who did not show likelihood of contracting disease as result of exposure); *see also Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 848 (3d Cir. 1995) (Pennsylvania law) (no recovery for emotional distress for uninjured plaintiffs exposed to toxic wastes in soccer field that was formerly a landfill), *cert. denied*, 116 S. Ct. 772 (1996); *cf. Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 904-05 (Va. 1981) (in determining whether suit was timely filed, stating that action for cancer arising from asbestos exposure does not accrue until plaintiff suffers actual physical harm; "legally and medically there was no injury upon inhalation of defendants' asbestos fibers").

Rather than following the teachings of the common law as required by *Gottshall*, the Second Circuit found the virtually uniform common law precedent "inapposite."

See Buckley, 79 F.3d at 1345. Instead, the Court chose to rely on three decisions. One of those decisions, *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983), can only be described as anomalous and is, in any event, of dubious authority, having been disavowed by later courts in recognition of the Illinois courts' "refus[al] to allow recovery for mental or emotional distress in the absence of a physical injury or illness." *Poole v. Alpha Therapeutic Corp.*, 698 F. Supp. 1367, 1371-72 & n.4 (N.D. Ill. 1988). The other two decisions relied upon by the Second Circuit support Metro-North's position, not Buckley's, because they involved an actual physical injury. *See Hagerty v. L & L Marine Servs.*, 788 F.2d 315, 316-17 (5th Cir. 1986) (plaintiff sustained impact after being doused with chemicals and suffered dizziness, leg cramps, and stinging sensation in his extremities); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478, 480 (C.P. Cayahoga Cty. 1987) (plaintiff had physical injury – asbestosis).

In *Gottshall*, this Court emphasized that the Third Circuit's rejection of the common law was fundamental error. *See Gottshall*, 114 S. Ct. at 2408 ("[b]y treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on 'meritorious' FELA claims, the Third Circuit put the cart before the horse: the common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the 'merit' of a FELA claim of this type cannot be ascertained without reference to the common law"). As the Court made clear, in terms that starkly reveal the Second Circuit's error in *Buckley*:

> Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability.

Id. at 2411.

In sum, the Second Circuit's decision is contrary to *Gottshall* both because Buckley's claim does not satisfy *Gottshall's* zone of danger test and because, like the Third Circuit's decisions in *Gottshall* and *Carlisle* that this Court reversed, the Second Circuit's decision allows recovery under the FELA for injuries that are not compensable under the common law.

CONCLUSION

For the foregoing reasons, *amicus curiae* Consolidated Rail Corporation respectfully requests that this Court grant the petition for a writ of certiorari.

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Dated: September 27, 1996.

MOTION FILED
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Petitioner,
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MICHAEL BUCKLEY,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

17 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-320

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

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On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Metro-North Commuter Railroad Company, has consented to AAR's filing of a brief.[1] Respondent, Michael Buckley, has refused consent.

Amicus curiae AAR is an incorporated, nonprofit trade association representing the nation's major

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[1] The letter expressing consent has been filed with the Clerk of the Court.

freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. Over the past decade, the railroad industry has seen a sharp increase in the number of FELA claims filed alleging emotional injury. This phenomenon has raised important issues about the intended scope of FELA and poses the potential for greatly expanding railroad liability. In recognition of the importance of this issue, AAR filed briefs to this Court in the cases of *Atchison, Topeka & Santa Fe* v. *Buell*, 480 U.S. 557 (1987) and *Consolidated Rail Corp.* v. *Gottshall*, 114 S. Ct. 2396 (1994), both of which raised aspects of the issue.

When AAR appears before a court as *amicus curiae* in an FELA case it brings a broad, industry-wide perspective to the issue. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole.

Because of its long involvement with FELA, AAR is in an excellent position to address questions arising under that unique statute. AAR conducts an anual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence.[3]

AAR works closely with its member roads' litigation counsel on problems associated with FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, a 1200 member organization of attorneys representing railroad companies in personal injury litigation. As a result, AAR is thoroughly familiar with the trends and problems associated with FELA.

AAR has spearheaded railroad industry legislative efforts to bring treatment of railroads in the area of employer liability into conformity with all other industries, which are covered by no-fault workers' compensation laws. During the course of these efforts, AAR has worked with the shortline and regional railroads, as well as the commuter authorities, all of whom are also governed by FELA, but whose perspectives may be somewhat different from the large freight roads which mostly constitute AAR's membership. Consequently, AAR has become familiar with the impact of FELA on all components of the rail industry.

AAR's primary interest with regard to FELA in the judicial arena is to prevent courts from expanding railroad liability beyond FELA's intent. Lower courts sometimes fail to appreciate that FELA is a unique statute. While FELA's obligation to respond in unlimited damages is unprecedented, and substantial compared to the obligations imposed on other employers, FELA limits employer obligations in some

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[2] *E.g.*, *Monessen Southwestern Ry. Co.* v. *Morgan*, 486 U.S. 330 (1988); *Burlington Northern R.* v. *Oklahoma Tax Commission*, 481 U.S. 454 (1986); *Burlington Northern R.* v. *Anderson*, 709 P.2d 641 (Mont. 1985), *cert. denied*, 476 U.S. 1116 (1986).

[3] *See* ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (published annually).

ways that workers' compensation does not. Moreover, the problem is compounded by FELA's liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant court decisions can have a far reaching impact. So long as Congress continues to keep this regime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

In this case, the lower court has issued a decision that imposes FELA liability for emotional injuries beyond the scope delineated by this Court in its recent *Gottshall* decision. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. In this case, as in others, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per cent of the rail industry's line haul mileage, produce 93 per cent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers. No-fault workers' compensation systems now cover all other industries and workers except railroad employees and seamen.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. AAR's members expend substantial sums of money defending FELA claims and suits and in the payment of FELA settlements and verdicts, far more, by any reasonable standard of comparison, than is spent by other industries in connection with compensating employees for work related injuries.[2]

The Second Circuit's decision in *Buckley* v. *Metro-North Commuter Railroad*, 79 F.3d 1337 (2nd Cir. 1996) is of particular concern to AAR's members. The ruling below circumvents the carefully crafted limits on liability in emotional injury cases established by this Court in *Consolidated Rail Corp.* v. *Gottshall*, 114 S. Ct. 2396 (1994), and opens the door to an entirely new class of FELA claims. As a result, it exposes railroads to the potential for far greater liability than was intended under FELA as interpreted by this Court.[3]

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688.

[2] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 2-2 (May 1996) (CLAIM & LITIGATION REPORT). Over the past five years, AAR members have spent, on average, $1.2 billion on FELA annually, or about 3.7 per cent of their gross revenues. CLAIM & LITIGATION REPORT (calendar years 1991, 1992, 1993, 1994, 1995).

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *Gottshall*, this Court held that the common law zone of danger test must be applied to claims for negligent infliction of emotional distress under FELA. The *Gottshall* holding acknowledged the need for establishing some restrictions on the right to recover for negligent infliction of emotional distress. In *Buckley*, the court ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate

[3] AAR submits this brief to address the substantial deleterious consequences that the *Buckley* decision, if allowed to stand, will have on the railroad industry. AAR respectfully refers the Court to Metro-North's petition for certiorari and the amicus curiae brief submitted by the Consolidated Rail Corporation for a fuller discussion of the *Buckley* decision's marked departure from well-established legal precedent under both FELA and common law.

risk of physical injury from an impact. This ruling is inconsistent to *Gottshall*.

If allowed to stand, *Buckley* will significantly and improperly expand railroad liability under FELA. While the Second Circuit purported to limit its decision to the unusual circumstances of the plaintiff's case, it enunciated no principles offering guidance as to when a claim for negligent infliction of emotional distress, alleged as a result of a workplace exposure, would be cognizable. In recent years thousands of rail employes have filed claims based on exposure to asbestos and other substances or environmental conditions in the workplace that allegedly cause future disease. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness.

ARGUMENT

In *Gottshall*, this Court closed the door to "unpredictable and nearly infinite liability." 114 S. Ct. at 2411. In the case at bar, the Second Circuit has flung that door wide open. In *Buckley*, the court ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate risk of physical injury from an impact. 79 F.3d 1337 (1996). Moreover, the court was undeterred by the lack of objective evidence supporting plaintiff's claim that he suffered an "emotional injury" beyond his own assertions of fear and anger. *Id.* at 1346. This ruling is

directly contrary to *Gottshall*. Significantly, it will allow rail employees who can allege occupational exposure to an environmental condition that may be linked to a disease to recover unlimited damages under FELA, despite the fact they have no physical injury, may never become ill, and may never even display physical symptoms of injury or disease.

Petitioner has demonstrated the errors in the decision below, and its conflict with decisions of other courts, warranting review by this Court. Review is further warranted because the holding below is not, as the Second Circuit suggests, a narrow ruling affecting a very limited number of claims. Rather, it is a significant departure from precedent that will have a substantial economic impact on all railroad employers.

THE SECOND CIRCUIT'S MISAPPLICATION OF *GOTTSHALL* WILL CREATE A NEW AND UNPRECEDENTED CLASS OF FELA CLAIMS

In *Gottshall*, this Court held that the common law zone of danger test must be applied to claims for negligent infliction of emotional distress under FELA. That test, the Court ruled, is "consistent with FELA's central focus on physical perils." 114 S. Ct. at 2410. The *Gottshall* holding acknowledged the need for compromise between the desire to compensate all genuine claims and equally compelling countervailing policies warranting well founded restrictions on the right to recover for negligent infliction of emotional distress. *Id.* at 2411.[4] The Second Circuit's approval

[4] The Court stated that among the policies underlying common law restrictions on recovery for negligent infliction of emotional distress are: the potential flood of trivial suits, the possibility of fraudulent claims that are difficult for judges

of Buckley's claim in the absence of any physical injury, or any immediate risk of physical harm, is inconsistent with *Gottshall*'s teaching.

The Second Circuit set aside concerns over the flood of litigation that might follow its unprecedented ruling, and opted for a "more flexible view" as "most consistent with FELA's remedial nature." 79 F.3d at 1345.[5] However, as this Court has pointed out, railroads are *not* insurers of their employees' emotional well being, and notions of negligence and injury under FELA are grounded in the common law. *Gottshall* 114 S. Ct. at 2404.[6] Though the court professed to acknowledge as much at the outset of its

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and juries to detect, and the specter of unlimited and unpredictable liability. 114 S. Ct. at 2411.

[5] As Petitioner points out, the precedents relied on by the Second Circuit, *Hagerty* v. *L & L Marine Servs.*, 788 F.2d 315 (5th Cir. 1986) and *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio Ct. C.P. 1987), are distinguishable. Pet. Br. at 12, n.8.

[6] Though it is often recited that FELA is to be liberally interpreted, what frequently is overlooked is that, to the extent there is a lowering of an FELA plaintiff's burden, it applies only to the issue of causation. *See, Rogers* v. *Missouri Pacific R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957); *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108 (1963). *But see* Wellington & Sproul, *"In Whole or In Part" And the FELA: Time for a New Look at Proximate Causation and Damage Apportionment*, 32 The Chronicle 82 (Jan/Feb 1987). (Arguing that the legislative history of FELA does not support a relaxation of the standard of causation.) Moreover, *Gottshall* makes clear that "[o]nly to the extent of [] explicit statutory alterations is 'departure from the rules of common law'" permissible under FELA. 114 S. Ct. at 2404.

opinion, 79 F.3d at 1342, it went on to interpret FELA without regard to that admonition.[7]

While the Second Circuit characterized the case as "unusual", no principle enunciated in *Buckley* limits its holding to the particular facts of that case. The court described the plaintiff's exposure as "massive, lengthy, and tangible." *Id.* at 1345. However, this characterization offers virtually no meaningful guidance as to the circumstances under which a claim for emotional injury will be cognizable. The plaintiff exhibited no manifestation of any physical injury and introduced, at best, scant evidence of emotional distress.[8] He elicited testimony that his exposure resulted in only a one to three percent increased risk of cancer.[9] Given these facts, it is difficult to read the *Buckley* opinion as anything but expansive, opening the floodgates *Gottshall* intended to close.

The threat *Buckley* poses to the railroad industry is great. Although asbestos has not been generally used in the railroad industry for years, rail employees continue to bring large numbers of FELA claims alleging injury from exposure to asbestos, as the latency period before manifestation of disease, if it occurs at all, can be up to 40 years. Since 1990, over 14,000 new asbestos claims have been brought against

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[7] *See* part II of the brief of amicus curiae Consolidated Rail Corporation for a fuller discussion of the Second Circuit's disregard for common law precedent.

[8] Not only did plaintiff not claim any physical injury, but the Mount Sinai doctors who examined him could find no clinical evidence of asbestos exposure or disease. *See* 79 F.3d at 1341.

[9] *Id.*

American railroads.[10] In many of these cases the railroad defense is that the plaintiff suffers no disease, or at least not one caused by exposure to asbestos.

AAR anticipates that, if *Buckley* is allowed to stand, the numbers of asbestos claims against railroads will increase, as workers suffering not even the slightest physical injury file claims for emotional distress based on alleged exposure to asbestos. Railroad claims experience shows that many rail workers have alleged exposure to asbestos. While the facts surrounding those alleged exposures may be different, the Second Circuit's legal analysis provides no way to distinguish Buckley's exposure from the exposure of other rail employees. In addition to those who have brought asbestos claims against their employers, there may well be many other rail employees who may believe they have been exposed to asbestos but have not yet brought a claim. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness. There would be no need to demonstrate even the slightest present health effects caused by their alleged exposure.

FELA claims for negligent infliction of emotional distress would not be limited to employees allegedly exposed to asbestos. Rail employees have brought FELA suits based on workplace exposure to other substances which have been alleged to cause future injury. Some of the more common examples include: diesel exhaust, *see e.g.*, *Summers* v. *Missouri Pacific R.R.*, 897 F. Supp. 533 (E.D. Okl. 1995); silica

[10] Data on the number of asbestos and other occupational illness claims have been supplied to AAR by its large member railroads.

dust, *see e.g.*, *Wooden* v. *Missouri Pacific R.R.*, 862 F.2d 560 (5th Cir. 1989); and chemical solvents, *see e.g.*, *Ulfik* v. *Metro North Commuter R.R.*, 77 F.3d 54 (2nd Cir. 1996). Since 1990, over 2000 FELA claims have been filed alleging exposure to various toxic substances (other than asbestos).[11] In fact, as the rail industry becomes a safer place to work, FELA claims alleging traumatic injury are fast being replaced by claims alleging an occupational illness, usually brought about by some alleged long term exposure to a deleterious environmental condition.

There is certainly controversy and dispute over whether the substances which form the bases for the new wave of FELA claims do, in fact, cause disease. The *Buckley* decision does not, however, require that there be anything other than a minimal increased risk that the plaintiff will ultimately contract a disease as a result of the exposure.[12] To the contrary, *Buckley* could well be read to support awarding damages for emotional distress to numerous rail employees who testify that they are angry and upset as a result of alleged exposure to a substance in the workplace, which, through some medical testimony, can be linked to the possibility of some future disease. In many, perhaps most, of these cases the future disease will never occur. If *Buckley* is overturned, those employees who do contract a disease will not be left without a remedy. They will be able to bring a FELA claim to recover all damages suffered, both for physical and mental injury.

[11] *See supra* note 10.

[12] *See supra* note 9 and accompanying text.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit in this case should be granted.

Respectfully submitted,

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MOTION FILED
SEP 30 1996

(5)

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the rules of this Court, the Washington Legal Foundation respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief, but the respondent has refused to provide consent.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular,

WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994); *Burlington Northern Railroad Co. v. Ford,* 112 S.Ct. 2184 (1992); *TXO Production Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1992).

WLF believes that the decision below in this case is a radical departure from the common law of tort liability and the law of liability under the Federal Employers' Liability Act (FELA). If left intact, this decision will impose significant costs on all businesses, both within the FELA context and without. These increased costs will ultimately be borne by consumers, workers, and society as a whole. WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

For the foregoing reasons, movant WLF respectfully requests that it be allowed to participate in this case and

file the annexed brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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QUESTION PRESENTED

May mere exposure to a potentially harmful substance, in the absence of any physical injury or even symptom, be a sufficient basis for recovery under the Federal Employers' Liability Act?

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BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decision below improperly permitted a plaintiff, who manifests no physical effect whatsoever from exposure to asbestos, to assert a claim under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, for negligent infliction of emotional distress based on his general, non-

severe anxiety regarding his future health. This ruling is directly contrary to the holding of this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994), is contrary to the overwhelming weight of common law authority in the area, and represents a radical expansion of tort liability.

In *Gottshall*, this Court recognized only a single, narrow exception to the general requirement that emotional distress must be accompanied by an underlying physical injury to be compensable. The "zone of danger" exception articulated by the Court in *Gottshall*, simply does not apply in the context of the instant case and was misapplied by the Second Circuit. Instead, this case much more closely parallels the claim asserted in the companion case, *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1990), which was rejected outright by this Court in *Gottshall*. There, this Court held that an employee's anticipatory, wholly speculative fear of physical injury cannot support a cognizable claim under FELA.

This limitation on liability for emotional distress is supported by sound policy concerns. Potential liability for mental distress claims of the sort asserted by petitioner would be far too vast, and their incidence much too unpredictable. Actionable tort claims would skyrocket and employers would have little or no ability to defend themselves against the flood of litigation. In the particular context of asbestos litigation, allowing claims based solely on emotional distress may exhaust the available resources of asbestos defendants and severely prejudice those who actually develop debilitating asbestos-related disease.

In short, the underlying decision is a significant and troubling one that is directly contrary to existing authority and

will have far-reaching effects if allowed to stand. For these reasons and the reasons set forth below, the Washington Legal Foundation (WLF) respectfully urges this Court to grant certiorari.

ARGUMENT

I. THE MENTAL DISTRESS COMPLAINED OF IS NOT COMPENSABLE UNDER THIS COURT'S FELA JURISPRUDENCE

The mental distress asserted by Buckley -- general, non-severe worry regarding potential future illness because of his exposure to asbestos while on the job -- is not compensable under the Federal Employers' Liability Act or the applicable common law. This Court's decision in *Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994), and numerous decisions of lower courts dealing with asbestos exposure, make clear that an employee may not recover for fear of future illness unless he has some physical injury because of the exposure. Simply put, general "free-floating" anxiety regarding a possible future injury, unconnected with any current physical symptoms of such an injury, is not compensable under FELA or the common law from which FELA gleans its liability standards.

In *Gottshall*, this Court considered two consolidated claims for negligent infliction of emotional distress; one arising from an alleged on-going program of stressful and dangerous working conditions that led to an employee's mental breakdown, and the other arising out of a particular harrowing incident in which a worker collapsed and died causing severe fright and long-term trauma to a co-worker

who witnessed the death. The underlying decisions of the Third Circuit had found both claims to be compensable because the mental distress was "genuine and serious" and was a foreseeable outcome of the employers' negligent actions. *Gottshall,* 114 S.Ct. at 2408.

This Court rejected the lower court's analysis as unworkable and unsupported by the common law. While this Court found for the first time that a claim of negligent infliction of emotional distress could be asserted under FELA, it recognized the real dangers inherent in this cause of action. Claims of negligent infliction of emotional distress must be strictly limited for two important reasons -- the potential for fraudulent and trivial claims and the prospect of "unpredictable and nearly infinite liability for defendants." *Id.* Focusing on the latter consideration, this Court emphasized that the "genuineness" test articulated by the Third Circuit would provide employers with "no standard against which to regulate their conduct," 114 S. Ct. at 2409, and would subject employers to liability essentially any time an employee had an adverse emotional response to an employer's negligent action. Because the only check on liability would be the severity of the employee's reaction, courts "would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts." *Id.* This approach would lead to unacceptable *ad hoc* decision-making and would cast the net of employer liability far too broadly.[1]

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[1] Thus, this Court has specifically rejected, at least in the FELA context, the standard arguably suggested by a small minority of common law decisions that recovery for negligent infliction of emotional

(continued...)

This Court then reversed the Third Circuit and established a far narrower test for determining when a plaintiff may pursue a claim under FELA *solely* for emotional distress without any accompanying physical injury. The Court adopted the "zone of danger" test, holding that the sole exception to the general rule that emotional harm is compensable only when linked to a physical injury is where the employee --although in fact unhurt physically -- was within the immediate vicinity of an accident or incident and was threatened with imminent physical injury. In other words, where a ceiling collapses due to negligence, it will be no defense to liability if the employee standing under it was able to leap to safety at the last moment and avoid physical injury. 114 S. Ct. at 2406, 2410.

In deciding to restrict valid claims for negligent infliction of emotional distress in this manner, this Court explicitly recognized that certain plaintiffs who suffered real and severe emotional damage would not be entitled to recover under the law. *Gottshall*, 114 S. Ct. at 2411. This Court reasoned that numerous important policy concerns, including "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability," argue against providing a cause of action for all plaintiffs who have suffered emotional harm due to their employers' negligent actions. *Id.*

Contrary to the Second Circuit's conclusion in the instant case, the zone of danger exception provides no basis for Mr. Buckley to recover here. Indeed, none of the traditional

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[1](...continued)
distress could be allowed based solely on establishing medical proof of the severity of the distress.

elements of the zone of danger test is present where a plaintiff is seeking to recover for the increased anxiety he feels because of exposure to a potentially dangerous agent, such as asbestos. There was no accident or singular traumatic event here. Mr. Buckley is not in any imminent danger of developing a physical disease or impairment; indeed, his general anxiety is the result of his inability to determine for as many as twenty to thirty years whether he has been harmed in any way by his exposure. Finally, Mr. Buckley does not allege that he suffered a severe fright that led to emotional injury. *See Gottshall,* 114 S. Ct at 2406, 2410-11 (discussing traditional elements of zone of danger test and citing cases).

Rather, Mr. Buckley's claim is more akin to the claim pursued by the companion plaintiff, Mr. Carlisle, which this Court dismissed outright in the *Gottshall* decision. Mr. Carlisle was a train dispatcher who alleged that the unsafe working conditions that Conrail imposed upon him, including requiring him to rely on outdated and unsafe equipment, demanding that he work long and arduous shifts, and subjecting him to the supervision of an alcoholic boss, caused him to suffer severe emotional distress. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 92-93 (3d Cir. 1993); *see also Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 914 (3d Cir. 1994) (describing the cause of Mr. Carlisle's stress as the pressure "to achieve on-time performance" and "to ignore safety concerns that would slow the movement of trains"). In directing that judgment be entered against Mr. Carlisle, this Court reasoned that such a claim "plainly does not fall within the common law's conception of the zone of danger," and ruled that FELA does not provide any remedy for such work-related stress. *Gottshall,* 114 S. Ct. at 2411-12.

Mr. Buckley's claim is similar to that of Mr. Carlisle. Mr. Buckley claims that the unsafe working conditions created by Metro-North, i.e., the failure to protect him adequately against asbestos exposure, have caused him to fear that he may develop cancer or another physical impairment at some point in the future. The essence of Mr. Carlisle's claim is closely analogous. Mr. Carlisle claimed that unsafe working conditions made him fearful and overwrought. More specifically, the dangerous working conditions created by his employer caused him to be afraid that he would someday hurt himself in performing his job duties or that he would cause injury to passengers or freight at some future time, and the stress of this fear ultimately led to a mental breakdown. In rejecting Mr. Carlisle's claim, this Court concluded that this sort of generalized worry about possible future harms, no matter how severe, is not compensable under FELA.

The logic of the *Gottshall* decision regarding Mr. Carlisle's claim dooms Mr. Buckley's claim and demonstrates the fallacy of the Second Circuit's decision here. Certainly, if a negligently unsafe aspect of Mr. Carlisle's job had *actually* resulted in physical injury to him, he would have been entitled to assert a claim against Conrail for his physical injuries and any accompanying emotional distress. Prior to any such injury, however, his anticipatory concern regarding safety issues, no matter what emotional trauma it led to, was not a compensable injury under FELA or the common law. Similarly, if Mr. Buckley, in fact, suffers a physical impairment as a result of his exposure to asbestos, he will be allowed to pursue a claim for that physical injury and any accompanying emotional distress. Until that time, however, he does not have a claim under FELA.

II. THE SPECTER OF UNLIMITED AND UNPREDICTABLE EMPLOYER LIABILITY ARGUES STRONGLY AGAINST THE SECOND CIRCUIT'S DECISION

The Court made plain in *Gottshall* that concern regarding the specter of unpredictable and unlimited liability for employers was paramount. 114 S. Ct. at 2408-09, 2411. That concern is equally, if not more, applicable in the context of the instant case. If left intact, the Second Circuit's decision will significantly increase the liability of railroad employers in any number of contexts.[2]

In the arena of asbestos litigation alone, the effect of the Second Circuit's decision will be dramatic. As this Court certainly is aware, asbestos litigation is a huge and potentially crippling problem for the United States court system, and, indeed, for the United States economy. Tens of thousands of personal injury and wrongful death lawsuits seeking recovery for asbestos-related disease have been filed in state and federal courts over the past twenty-five years.[3] While it is not possible to determine precisely the number of workers and

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[2] The increased liability will not likely be limited to railroad employers. Just as FELA is informed by the common law, *Gottshall*, 114 S. Ct. at 2403, the common law is influenced by this Court's pronouncements of tort law under FELA.

[3] The size of the pending asbestos caseload remains a matter of great concern. As United States District Judge Charles Weiner, who presides over the federal multidistrict asbestos personal injury litigation, recently noted, the total number of asbestos cases that have been filed in the multidistrict proceeding is 58,478, and only approximately 20,000 of these have been resolved to date. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, CA No.2 MDL 875, 1996 WL 239863, at *5 (E.D. Pa. May 2, 1996).

individuals that have been exposed to asbestos, experts have estimated that more than 21 million workers were significantly exposed to asbestos in the 40 years prior to 1980. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1337 (5th Cir. 1985), *citing*, I. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States*, Environmental Sciences Laboratory, Mt. Sinai School of Medicine of the City University of New York (1981).[4] Certainly, several million of these workers are likely covered by FELA.

If the Second Circuit's decision is allowed to stand, there would be, for all intents and purposes, no limit to the class of plaintiffs that would be entitled to sue for negligent infliction of emotional distress. Literally any worker that had contact with asbestos in the work place, and we know that there are millions of such individuals, would be entitled to sue for any increased worry and concern they might have as a result of that exposure. An employer's liability would be nearly limitless and entirely unpredictable. As the Third Circuit concluded,

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly

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[4] For this reason, the only limiting principle that the Second Circuit announced here -- that the contact with asbestos be "massive" and not "incidental," (A-23), is no limit at all as a practical matter. In addition, this subjective, undefined standard would subject juries and judges to just the type of *ad hoc*, line-drawing decision-making that the Court denounced in *Gottshall*. 114 S. Ct. at 2409.

> speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

Schweizer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

Beyond the asbestos context, employers could potentially be liable for any negligently-created working condition that increased an employee's anxiety about his future health. For example, an employee could assert a claim for negligent infliction of emotional distress based on high-stress conditions that increased his worry about contracting an ulcer or suffering a stroke or heart attack; based on the presence of second-hand smoke in the work place that increased his concern about developing lung cancer; or based on the presence of electromagnetic fields from power lines that increased his anxiety about getting brain cancer.

This is precisely the sort of unlimited, unpredictable, and unprincipled liability that this Court denounced in *Gottshall*.

III. ALLOWING RECOVERY SOLELY FOR ANXIETY MAY EXHAUST AVAILABLE RESOURCES AND ULTIMATELY HARM ASBESTOS PLAINTIFFS

Allowing asbestos plaintiffs, such as Mr. Buckley, to recover for their "fear of cancer" alone, may end up undercompensating them if they actually do develop an asbestos-related impairment.

FELA has traditionally been a single recovery statute, meaning that a plaintiff may sue only one time for injuries arising from a particular wrongful act of the employer. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York. N. H. & H. R. Co.*, 283 U.S. 53, 56 (1931). The Second Circuit here explicitly ruled that Mr. Buckley can recover only for his current emotional harm and not for the risk of contracting an asbestos-related disease at some future date. (A-18, n.1) If Mr. Buckley ultimately develops a physical impairment, it is not at all clear that he will be able to pursue a second claim against Metro-North for his physical injury. Thus, if his claim is allowed to go forward now, Mr. Buckley could potentially end up considerably *undercompensated* for injuries caused by his asbestos exposure.

Moreover, even if FELA plaintiffs were allowed to pursue a second claim for physical injuries, the Second Circuit's decision may reduce their ability to recover. As this Court is undoubtedly aware, neither the nation's judicial resources nor the resources of asbestos defendants are infinite. As the bankruptcy filings of numerous asbestos manufacturers attest, there is a limited amount of money available to compensate those individuals injured by asbestos, and that pool of funds may be exhausted at some point. For this reason, experts have counseled that claims should be addressed in the order of their severity. *See, e.g.*, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv.J.L. & Pub. Pol'y 541 (1992); *In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863 at *5 (dismissing claims of asymptomatic plaintiffs because they "waste this Court's time. Other victims suffer while the Court is clogged with such filings.").

Here, the Second Circuit has not even limited legitimate asbestos claimants to those who suffer from some physical symptom of asbestos exposure. If the doors of the courthouse are thrown open wide enough to admit those that do not yet have *any* physical effect of their exposure, there may be little or no monies remaining for those that become diseased several years down the road.

IV. THE DECISION BELOW WOULD MAKE EMPLOYERS' LIABILITY BROADER AND MORE UNPREDICTABLE, THUS MAKING IT MORE DIFFICULT TO INSURE

The decision below would expand employers' liability for emotional distress far beyond the boundaries of the zone of danger exception. The increased breadth and unpredictable nature of this liability will increase the cost and restrict the availability of liability insurance.

Workplace mental distress is far more difficult for an employer to predict and guard against than physical injury. Physical injuries, which have a clear physical cause and effect, do not depend primarily on the individual characteristics of the plaintiff.[5] Emotional injuries, on the other hand, depend entirely on such characteristics. *See* Marc A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages In the Absence of Physical Injury*, 1990 Ann. Surv. Am. Law 671, 672. "Where a workman loses a finger because of an errant

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[5] For this reason, the zone of danger exception, which is premised on the occurrence of an accident or other singular physical event, is a much more limited area of liability than that created by the decision below.

piece of machinery, the ascertainable injury and the work-related cause are direct and simple. However, emotional distress may have multiple causes, some work-related, others not so related." *Archer v. Indus. Comm'n*, 619 P.2d 27 (Ariz. Ct. App. 1980). Clearly, a worker's "personal subjective vulnerability" determines his or her reaction to job conditions, including job stress or exposure to toxic agents. Sara J. Sersland, *Mental Disability Caused By Mental Stress Cases*, 33 Drake L. Rev. 751, 757 (1983-84). Moreover, while asbestos-related diseases follow an etiology that allows their rate to be predicted with some statistical certainty, and historical claims rates can be used to predict the rate of industrial accidents, emotional distress claims have no such characteristic.

It is simply not possible to estimate with any degree of certainty the number of persons that may have an adverse emotional response to exposure to asbestos or any other unsafe working condition. The unpredictability of emotional distress, and therefore of liability for emotional distress under a negligence standard, will have an important economic consequence: it will reduce the availability and increase the cost of liability or workers' compensation insurance. Insurance requires that risk be statistically predictable over the long term. *See* Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 136-37 (1988); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399, 404-09 (1987). Insurers do not have the means to make the predictions about the incidence and severity of emotional distress claims that are necessary to price an insurance product efficiently. Employers will therefore find liability insurance more difficult to find and

more costly to purchase.[6] These increased costs will be passed on, in whole or in part, to workers, in the form of lower wages, and/or consumers, in the form of higher prices.

V. THE DECISION BELOW WOULD LEAD TO TREMENDOUS DIFFICULTIES IN THE APPLICATION OF THE STATUTE OF LIMITATIONS

Finally, the decision of the Second Circuit to allow Mr. Buckley's speculative claim to proceed not only represents bad policy, it will also lead to practical problems in the prosecution of such claims. Specifically, the relevant statute of limitations issues would be exceedingly difficult to adjudicate.

The application of a statute of limitations depends on a determination as to when the claim being asserted arose. Virtually every court that has considered asbestos claims in this context has determined that no claim arises "until an objectively verifiable functional impairment develops." *In re Hawaii Federal Asbestos Cases,* 734 F. Supp. 1563, 1570 (D.

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[6] As stated by the dissenting judge in *Vallery v. Southern Baptist Hospital*, 630 So.2d 861, 870 (La. App. 1993):

> Where insurance companies cannot quantify a certain risk, the cost of insurance can be out of all proportion to the risk. [Allowing individual to recover for fear of AIDS without an physical injury] would add another costly layer of inordinate expense to the treatment of AIDS without doing anything to advance the treatment of AIDS. From a public policy perspective, this would represent a very poor allocation of health care dollars at a time when money for AIDS is insufficient in particular, and the cost of health care in general is in crisis.

Hawaii 1990); *accord Simmons v. Pacor, Inc. et. al.*, 674 A.2d 232 (Pa. 1996); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900 (Va. 1981). This is consistent with the precedent of this Court. *See Urie v. Thompson,* 337 U.S. 163, 170 (1949) (worker exposed to silica dust sustains injury and cause of action accrues only as of time that adverse effects first manifest themselves). Thus, the development of a physical injury is the triggering event, and the applicable statute of limitations begins to run from that time.[7]

With a claim solely for emotional distress, entirely unconnected to any physical event, injury, or even symptom, there is no objectively verifiable triggering event to begin the running of the statute of limitations. A plaintiff could arbitrarily set the date on which his emotional distress developed. This date could be manipulated to achieve the largest recovery from an employer and/or its insurance companies. (For example, the date could be set just prior to or after a sale of the employing company, whichever was perceived to be most advantageous, or at a time when the employer's insurance coverage was greatest.) Because of the long incubation period of asbestos-related disease, there could be a twenty or thirty-year period over which a plaintiff could at any time decide that he could no longer cope with the fear of cancer and elect to pursue a claim for negligent infliction of emotional distress. Obviously, this significantly undermines the policy underlying statutes of limitations; i.e., that at some point in time the law should no longer recognize a claim.

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[7] Similarly, under the narrow "zone of danger" exception, the triggering event for the statute of limitations is a known physical accident of incident.

On the other hand, employers would likely argue that the statute of limitations for an emotional distress claim should begin to run at the time that the plaintiff "knew" all the facts about his exposure and the health risks of asbestos. Again, this is an unknown, virtually unverifiable date. Employers would gather evidence seeking to establish this event on the most convenient date for the employer. Insurance companies that provided coverage to the employer over different time periods would certainly weigh in to argue for a particular start of the statute of limitations period.

In short, simply establishing the date on which the "claim" arose would be a highly fact-specific threshold inquiry that could require its own mini-trial to resolve. *See In re Hawaii,* 734 F. Supp. at 1570 (refusing to recognize a claim for fear of cancer in part because "[a] regime of recovery for emotional distress not anchored to an underlying compensable harm presents boundless headaches in adjudicating statute of limitations problems."). Such serious practical obstacles to adjudicating claims properly argue strongly against expanding tort liability in this manner.

In sum, there are considerable "costs" -- whether in the form of increased crowding of the courts, the potential for the exhaustion of available resources to compensate asbestos plaintiffs, of the direct costs associated with buying insurance coverage and paying claims -- that will result from the expansion of FELA liability in the manner directed by the Second Circuit. These costs will be borne by society as a whole to benefit a class of plaintiffs, the overwhelming majority of whom *will never contract any form of asbestos-related disease.* This is too great a price to pay and one which the law does not support.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court grant certiorari and reverse the decision of the Second Circuit.

Respectfully submitted,

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MOTION FILED
SEP 30 1996

(4)

No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF PETITION

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MOTION OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Port Authority of New York and New Jersey ("Port Authority") respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The application is made pursuant to Rule 37.2(b) of the Rules of the Supreme Court. Consent to the filing of the brief *amicus curiae* has been received from the attorney for the Petitioner, but not from the attorney for the Respondent.

The applicant, the Port Authority, is a body corporate and politic created in 1921 by a Congressionally-consented-to compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws Ch. 151 and 1921 N.Y. Laws Ch. 154. The Compact is codified at N.Y. Unconsol. Law §§6401-23 (McKinney 1979). At the present time, pursuant to the 1921 Compact, and subsequent bi-State legislation, the Port Authority owns and/or operates thirty-three (33) such facilities, including, through its wholly-owned subsidiary, the PATH interstate railway system. N.Y. Unconsol. Law §6612 (McKinney 1979).

The operation of the PATH system is regarded as an essential governmental function for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Law §6610 (McKinney 1979). Through its operation of the PATH system, the Port Authority is often a defendant in cases brought pursuant to the statute at issue, the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51. Hence, the interests of the applicant are directly impacted by the ruling of the Second Circuit at issue in this petition for grant of a writ of certiorari.

Entities involved in providing public transportation have experienced an increasing volume of claims over the past decade from plaintiffs seeking to recover for emotional

distress. *See, e.g., Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994); *Atchison, Topeka & Santa Fe v. Buell,* 480 U.S. 557 (1987). This Court, in its opinion in *Gottshall,* placed sensible limitations on the right of employees to sue railroads for the negligent infliction of emotional distress, limitations that will be substantially eroded if the ruling of the court below in the instant case is permitted to stand.

The court below clearly was influenced in its ruling by the allegations of grievous misconduct made by the plaintiff-respondent against the defendant-petitioner. The Port Authority wishes to appear as *amicus curiae,* however, to press home the point that the court below has resolved what it saw as a "hard case" in a way that will have a punitive effect on all potential defendants in FELA cases, including the Port Authority, and will result in a flood of litigation and damage demands of incalculable magnitude.

The Port Authority believes that, if permitted to file its brief, it can assist the Court in understanding the full ramifications of the decision in this case and the range of actors and actions that will feel its baleful effects.

For these reasons, it asks that leave to file the attached *amicus curiae* brief be granted.

Respectfully submitted,

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September 30, 1996

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INTEREST OF THE *AMICUS*

The Port Authority of New York and New Jersey ("Port Authority") is a body corporate and politic created in 1921 by a Congressionally-consented-to compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws Ch. 151 and 1921 N.Y. Laws Ch. 154. The Compact is codified at N.Y. Unconsol. Law §§6401-23 (McKinney 1979). At the present time, pursuant to the 1921 Compact, and subsequent bi-State legislation, the Port Authority owns and/or operates thirty-three (33) such facilities, including, through its wholly-owned subsidiary, the PATH interstate railway system. N.Y. Unconsol. §6612 (McKinney 1979).

The operation of the PATH system is regarded as an essential governmental function for the benefit of the people of New York and New Jersey. N.Y. Unconsol. §6610 (McKinney 1979). Through its operation of the PATH system, the Port Authority is often a defendant in cases brought pursuant to the statute at issue, the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51. Hence, the interests of the *Amicus* are directly affected by the ruling of the Second Circuit at issue in the instant case.

The Port Authority is particularly concerned about the impact on it, and on other similarly situated companies and public authorities, of the kind of vague and open-ended liability imposed on rail operators by the Second Circuit. If a worker who suffers no physical injury can nevertheless recover for the negligent infliction of emotional distress under FELA simply and solely because the plaintiff was negligently exposed to pollutants or toxic substances in the workplace, railroads will be faced with a vastly expanded,

possibly devastating, potential tort liability. *Amicus* asserts that the result upsets the carefully crafted remedial scheme that FELA represents, and undoes the limitations on recovery for emotional distress inherent in that scheme that were set out by this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994).

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

FELA has a broad remedial purpose, and it is appropriate to interpret it liberally. The Second Circuit, however, has exceeded the liberality of Congress and ignored the admonitions of this Court by establishing a "physical impact" rule that would permit plaintiffs negligently exposed to asbestos to sue for emotional distress. The ruling is punitive rather than compensatory in its intent and effect. It also creates a conflict among the Circuits. Furthermore, the Second Circuit's holding that medical monitoring awards are permissible violates the statutory language of FELA, limiting recovery to cases of actual injury. In short, the ruling below was designed to address an unusual set of allegations, but did so in a way that has broad and unfortunate implications for the entire railroad industry. For this reason, certiorari should be granted and the holding subjected to careful review by the Supreme Court.

ARGUMENT

I. THE COURT BELOW HAS ADOPTED A RULE OF LAW GOVERNING THE NEGLIGENT INFLICTION OF EMOTIONAL HARM IN FELA CASES THAT IS INCONSISTENT WITH THIS COURT'S INTERPRETATION OF THE STATUTE, IN CONFLICT WITH THE LAW OF OTHER CIRCUITS, AND THAT IGNORES THE NEED TO TAKE INTO ACCOUNT NOT ONLY THE PLAINTIFF'S INTERESTS, BUT ALSO THE DEFENDANT'S LEGITIMATE NEED FOR PROTECTION AGAINST FRIVOLOUS SUITS AND UNPREDICTABLE AND OPEN-ENDED LIABILITY

In the decision below in *Buckley v. Metro-North Commuter Railroad,* 79 F.3d 1337 (2d Cir. 1996), the Court of Appeals for the Second Circuit ruled that a plaintiff suing under FELA may recover for emotional distress and medical monitoring if he or she has been "physically impacted" by asbestos fibers, even though the plaintiff has not developed, and, fortunately, as statistics indicate, probably never will develop, any disease as a consequence of that exposure. *Amicus* respectfully submits that this reading of the law ignores precedent established by this Court, creates a conflict with the law in other Circuits, is inconsistent with the common law, and poses a serious economic threat to all rail operators subject to FELA. For these reasons, it stands in urgent need of further appellate review.

Claims of negligent infliction of emotional distress are recognized as compensable in modern tort law, but not without, at the same time, generating considerable anxiety

about the potential for serious mischief that would be posed if the right to recover for this tort were too broadly defined. As this Court observed in *Gottshall*, 114 S.Ct. at 2405, claims for emotional distress divorced from physical injury pose risks both of fraud and of the trivialization of the legal process through the proliferation of insignificant disputes. Even more serious is the risk that "allowing such suits can lead to unpredictable and nearly infinite liability for defendants." *Id.* at 2408. In light of these concerns, and in an effort to remain faithful to the intent of Congress in enacting FELA -- "to provide compensation for the injuries and deaths caused by the *physical* dangers of railroad work," *id.* at 2410 (emphasis added) -- this Court limited recovery under the Act for emotional distress to those plaintiffs who could show that they fell within a "zone of danger," i.e., that they were threatened with imminent physical peril. *Id.*

The imposition of this limitation frankly recognizes that even individuals who indisputably have suffered serious, palpable emotional scarring as a result of negligence may nonetheless be barred from any remedy because their situation does not place them within a narrowly delimited class of permissible claimants. Although the result can be harsh toward some plaintiffs, this Court noted in *Gottshall* that it was required to reach such a result by the need to balance the interests of plaintiffs and defendants in a way that respects the objectives of Congress in enacting FELA. *Id.* Similarly, the state courts, operating under common law, have recognized that the need for predictability and a reasonable restriction on the scope of potential liability demands that this cause of action be carefully limited -- despite the fact that some convincing claims of harm will be left without redress. *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989); *Bovsun v. Sanperi*, 461 N.E.2d 843, 847 (N.Y.

1984); *Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179, 1182 (Utah 1992).

Unfortunately, in deciding *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337 (2d Cir. 1996), the Second Circuit forsook the mandate of this Court, and abandoned the effort to keep liability under FELA for negligent infliction of emotional distress within reasonable bounds. In doing so, the court below specifically rejected contrary holdings from other circuits, *see Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (inhalation of asbestos fibers is not an injury for purposes of FELA); *Amendola v. Kansas City S. Ry.*, 699 F. Supp. 1401, 1403 n. 3, 1410-11 (W.D. Mo. 1988) (same). As a result, entities such as the *Amicus* may face wholly incalculable levels of future liability unless this Court grants the instant petition for certiorari and corrects the Second Circuit's error.

If the Second Circuit's ruling stands, any defendant who is found inadvertently but negligently to have allowed its employees to be exposed to a harmful pollutant or toxic substance, such as asbestos, is likely to be liable to each and every person so exposed for emotional harm and for medical monitoring. Clearly, under the Second Circuit formulation, recovery will not even be limited to cases in which there is a showing of severe distress; the court below was quite willing to allow a plaintiff with "injuries" like the Respondent's to recover, even though the court openly concedes that the "evidence of Buckley's emotional distress is not overwhelming." *Buckley*, 79 F.3d at 1346.

II. THE COURT BELOW REACHED A WRONG AND PUNITIVE RESULT

In truth, what seems to have motivated the court to reach its conclusion on the applicable legal standard is not some basic disagreement with the proposition that a tort like the negligent infliction of emotional distress needs carefully and narrowly defined boundaries. Rather, it seems to have occurred as a result of the court's reaction to the plaintiff's allegations of egregious wrongdoing on the part of his employer. The court describes the plaintiff as emerging from the steam tunnels under Grand Central Station day after day so covered with white asbestos dust that he and his co-workers were dubbed the "snowmen of Grand Central." *Id.* at 1340. *Buckley* is described as "an unusual case," an exposure to asbestos that was "massive, lengthy, and tangible," and furthermore, the allegations are that this exposure occurred with the knowledge of Metro-North and without any prior warning to the workers. *Id.* at 1340, 1345. Indeed, the court was sufficiently upset by these allegations that it openly acknowledged being unmoved by the possibility that its holding could lead to a "flood of litigation." *Id.* at 1345.

It is the sense of outrage conveyed by the opinion below that most compellingly argues for review by the Supreme Court. However distasteful the picture of the defendant's behavior, as presented in the opinion below, it should be remembered that, in reality, the facts of the case have yet to be determined. No ultimate findings of fact exist because the District Court directed a verdict for the defendant at the close of the plaintiff's case. *Buckley v. Metro-North Commuter Railroad*, No. 89 Civ. 7170-A (WK), 1995 WL 110380 (S.D.N.Y. March 15, 1995). And most importantly,

no issue of liability or damages based on any claim of intentional wrongdoing was before the Second Circuit. On the contrary, the sole issue the panel was asked to address was whether, based on simple negligence, a defendant could be required to compensate its employees for emotional distress and medical monitoring if they are exposed to asbestos at some indeterminate level above normal background amounts. *See Buckley*, 79 F.3d at 1344.

Amicus curiae wishes to point out that instead of limiting itself to the narrow issue legitimately before it, the court below seems to have allowed its view of the defendant's conduct to support a vast departure from and distortion of the traditional principles of tort law. The holding that workplace exposure to asbestos constitutes a physical impact sufficient to sustain a claim of negligent infliction of emotional distress serves the purpose of punishing Metro-North rather than compensating the plaintiff. After all, plaintiff complains of no physical injury, can offer no evidence of clinical disease, and does not claim severe emotional distress. The court itself admitted that the evidence of plaintiff's emotional distress was "slim." *Id.* at 1346.

III. EVEN IF THIS COURT WERE TO AFFIRM THE HOLDING OF THE SECOND CIRCUIT WITH REGARD TO ITS "PHYSICAL IMPACT" STANDARD FOR IMPOSITION OF LIABILITY IN CASES OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, RECOVERY FOR MEDICAL MONITORING WOULD NONETHELESS BE INAPPROPRIATE

The Court would perform an important service to entities in the position of *Amicus* by reviewing the holding below with regard to future medical monitoring.

Compensation for medical monitoring is not a remedy for a claim of existing emotional distress. It is intended to deal with a different issue: the risk that a physical ailment will develop at a future date. But because the disease does not exist at the time of the suit, requiring railroads to compensate workers for ongoing monitoring is incompatible with the statutory requirement of FELA that a plaintiff be permitted to recover only for actual injuries.

Luckily, most exposures to harmful or toxic substances in the workplace and elsewhere will never result in the development of disease in most people. And in the case of those unfortunate enough to suffer adverse consequences, the expression of the illness may not occur -- as has been the experience with asbestos -- until decades after the time of exposure. If employers governed by FELA are required to pay for future medical monitoring for every employee who stands even a remote chance of developing an illness related to workplace exposure, employers will become the suppliers of regular medical checkups for vast numbers

of present and past employees at an astronomical potential cost. This Court said clearly in *Gottshall*:

> That FELA is to be liberally construed . . . does not mean that it is a workers' compensation statute. We have insisted that FELA "does not make the employer the insurer of the safety of his employees . . . ."

114 S.Ct. at 2404 (citation omitted). The rule enunciated by the lower court would go well beyond what concerned this Court in *Gottshall*. It would, in effect, turn the employer into a medical insurer.

Workers' compensation laws do not go as far as the Second Circuit insists that FELA should. And certainly the common law of torts generally has not demanded that employers engage in medical monitoring -- particularly in cases where the plaintiff has, as his experts testified here, at most a five (5) per cent risk of ever developing an asbestos-related disease. *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1356 (S.D.W.Va. 1990), *aff'd*, 958 F.2d 36, 38 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992). Were this to become a generally accepted proposition, not only would employers like *Amicus* face bankrupting costs; the court system itself would collapse under the weight of the ensuing levels of litigation.

CONCLUSION

In light of the importance of the issues, and for all the reasons set forth in this brief, *Amicus Curiae* respectfully urges the Court to grant the petition for a writ of certiorari and to review the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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September 30, 1996

MOTION FILED
SEP 30 1996

(1)

No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

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v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, the American Tort Reform Association requests leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari.*

---

* Petitioner's letter of consent to the filing of this brief has been filed with the Court Clerk; Respondents did not consent to the filing of this brief.

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based, bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over a decade, ATRA has filed principal *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the recent landmark punitive damages decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

This case is of major interest to ATRA and its members, because the Second Circuit Court of Appeals' decision to permit a totally asymptomatic plaintiff to recover medical monitoring damages under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, inappropriately intrudes on the rulemaking function of Congress. The decision should be reversed.

Broad, complex policy issues, such as whether and under what circumstances damages for medical monitoring can be awarded, are best decided by Congress and state legislatures. A principal reason is that legislatures have the ability to consider diverse points of view and create prospective rules of law. Courts, on the other hand, are not well-equipped to determine complex tort policy rules, because they are typically exposed only to arguments of opposing counsel seeking to advance purely *private* interests. Further, when courts "make" law, they do so retroactively.

ATRA is well-suited to further this Court's understanding of the specific policy issues presented by medical monitoring damages. Accordingly, ATRA respectfully requests that this Court grant its motion for leave to file the accompanying brief as *amicus curiae* in support of the Petitioner.

Respectfully submitted,

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BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over a decade, ATRA has filed principal *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the recent landmark punitive damages decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

This case is of major interest to ATRA and its numerous members, because the Second Circuit Court of Appeals' decision to permit a totally asymptomatic plaintiff to recover medical monitoring damages under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, intrudes directly on the rulemaking function of Congress.

Broad and complex tort policy issues, such as medical monitoring, are more appropriately left to Congress and state legislatures, because of their ability to hear from a wide array of witnesses and create prospective rules of law. Courts are not as well-equipped to resolve such issues, principally because their perspective is generally limited to arguments from opposing counsel seeking to advance purely *private* interests. Further, when courts "make" law, they do so retroactively, denying "fair notice" to the public about rights and responsibilities that may result from significant new changes in the law.

ATRA submits this brief to further this Court's understanding of the specific policy issues presented by medical monitoring damages, a core issue in this case. ATRA urges this Court to grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

ATRA adopts Petitioner's summary of the dispute in question.

REASONS FOR GRANTING THE PETITION

I. CONGRESS AND STATE LEGISLATURES ARE THE MOST APPROPRIATE FORUMS TO DETERMINE WHETHER A MEDICAL MONITORING REMEDY IS NEEDED AND HOW IT SHOULD BE IMPLEMENTED.

For much of this Nation's history, courts developed tort law in a slow, incremental fashion.[1] That process generally worked well. In recent years, however, the incremental approach has been abandoned in some cases, resulting in potentially large *adverse* consequences to the Nation's civil justice system and those who must abide by its rules.

For example, early in the asbestos litigation, courts empathetic to the claims of asbestos claimants deviated from accepted legal principles to permit recoveries which traditionally would have been barred. As the courts lowered legal standards, new plaintiffs flooded the civil justice system. While the courts in these cases may have had good intentions, the litigation turned into a judicial "disaster of major propor-

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[1] For example, it took almost *fifty* years from the time of then-Judge Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916), removing the privity barrier in product liability negligence cases, before the New Jersey Supreme Court decided *Henningsen v. Bloomfield Motor Co.*, 161 A.2d 69 (N.J. 1960), removing the privity barrier in implied warranty actions involving personal injury. Three additional years passed before Judge Traynor, writing for the California Supreme Court, recognized privity-free strict liability in tort in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Several more years passed before the rule of strict product liability became the common law of most states. *See* John W. Wade *et al., Prosser, Wade and Schwartz's Cases and Materials On Torts* 717 (9th ed. 1994).

tions." [2] People with very serious damages had to wait long periods of time before courts could hear their cases; some did not live to obtain a remedy. The problem of separating out and quickly assisting seriously injured persons, now caught in a sea of litigation, was so great that the judiciary *sought* congressional intervention to address the crisis, explaining that the "courts [were] ill-equipped to meet [it] effectively." [3]

The legacy of those early decisions continues. In this case, the Second Circuit Court of Appeals embraced a novel theory of recovery (*i.e.*, the award of "medical monitoring" damages) that is contrary to traditional common law principles and has been recognized in only a small number of jurisdictions.[4] For over 240 years, the traditional tort law rule has been that a plaintiff must suffer actual injury before he or she will receive an award in tort. The rationale of the rule is that tort law needs some basic boundaries.

Medical monitoring claims raise difficult and complex issues. These issues are *extremely* broad, and are not subject to judicial control—on a daily basis, almost everyone comes into contact with a potentially limitless number of materials that, arguably, may warrant a "medical monitoring" remedy.[5] Lawyers

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[2] Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report of the Ad Hoc Committee*, at 2 (1991).

[3] *Id.*

[4] *See Buckley v. Metro-North Commuter R.R.*, 79 F.2d 1337 (2d Cir.), *petition for cert. filed*, 65 USLW 3166 (Aug. 29, 1996).

[5] Everyone is exposed "to potential health hazards each day through the air they breathe, water they drink, food and drugs they ingest, and on the land on which they live." Terry

and judges in the courtroom, however helpful, cannot resolve these issues.

ATRA submits that decisions to establish retroactive, wholesale, and complex changes in liability law, including the award of damages for medical monitoring, are best addressed by Congress and state legislatures.[6]

A. Legislatures Are Better Equipped Than Courts To Address The Broad Public Interest In Medical Monitoring.

Courts are particularly well-suited to adjudicate individual disputes concerning discrete issues and parties. The Founding Fathers recognized this when they drafted the Constitution to give the judiciary

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C. Gay & Paige F. Rosato, *Combatting Fear Of Future Injury And Medical Monitoring Claims*, 61 Def. Couns. J. 554, 562 (1994).

[6] This is particularly the case where, as here, the underlying cause of action is statutorily-based. Courts may not rewrite the FELA statute to provide medical monitoring damages; it is up to Congress, if it desires to do so, to change the law. *See generally* Roger S. Fine, *A Personal Perspective from the "Manufacturer,"* 55 Brook. L. Rev. 899, 903 (1989) ("[L]et us go back to the days when there was a real difference between the judicial and legislative branches. When a court is faced with a problem that is a social one rather than a legal one, we defer to the legislature, which has far more flexibility and power to mold solutions that match our problems"); Stephen A. Spitz, *From Res Ipsa Loquitur to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 Ind. L.J. 591, 634 (1990) ("[M]any situations are better left in the legislative domain and/or are best addressed by providing administrative remedies").

jurisdiction to decide "cases and controversies." [7] This particularized focus, however, involves some basic limitations; it deprives the judiciary of the comprehensive access to information that is essential to the formation of complex and sound national tort policy rules.

Legislatures, on the other hand, are well-equipped to reach *fully* informed positions about the need for widespread changes in the law. They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, a witness can be recalled. This process allows legislatures to engage in broad policy deliberations.[8] Accordingly, legislatures are in the best position to consider whether a medical monitoring remedy is needed, and if it is needed, to resolve its complex issues.[9]

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[7] *See* U.S. Const. art. III, § 2, cl. 1.

[8] *See generally Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 736 (Haw. 1991) (Moon, J., concurring in part and dissenting in part) (disagreeing with the majority's application of "market share liability" to a blood products case, because "[t]here are too many unanswered questions of social, economic, and legal import which only the legislature, with its investigative powers and procedures, can determine"); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) ("[A]warding damages . . . by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain").

[9] The American Law Institute's new draft Restatement on the law of products liability similarly finds that when the government has superior access to information, it, rather than the courts, should act. *See Restatement Of The Law Of Torts: Products Liability* § 20 (Tent. Draft No. 3 April 5, 1996) ("Issues relating to product recalls are best evaluated by a governmental . . . agency capable of gathering adequate data regarding ramifications of such undertakings").

B. Legislatures' Prospective Treatment Of The Law Is Better Suited For Implementing Medical Monitoring Awards Than Courts' Retroactive Treatment Of The Law.

Further, adoption of a novel remedy, such as medical monitoring, that effects a sweeping change of the rights and responsibilities of the public, should be done prospectively, if at all, to provide "fair notice" to everyone potentially affected.

Courts, following the common law process, institute their rulings on a retroactive basis. Although this may be appropriate when implementing minor adjustments to common law principles, it is not appropriate when the "adjustments" precipitate a broad, fundamental change in an available tort remedy.

By way of contrast, legislative consideration of medical monitoring will result in prospective legislation that will give the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As this Court said in its most recent decision on the subject of punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598 (1996) (emphasis added). Courts do not have the ability to provide this "fair notice"; legislatures do.

II. COMPLEX ISSUES WHICH SHOULD BE CONSIDERED BEFORE MEDICAL MONITORING IS AWARDED DEMONSTRATE WHY LEGISLATURES PROVIDE A BETTER FORUM THAN COURTS FOR IMPLEMENTING THE REMEDY.

Recognition of the medical monitoring remedy in this case could lead to an administrative "nightmare" that a fully informed judiciary may solidly wish to avoid.

A. Legislatures Are In The Best Position To Establish A Clear And Sound "Trigger" As To When Medical Monitoring Is Appropriate.

For example, before parties can be given access to medical monitoring, a clear and sound "trigger" must be set to identify the specific circumstances under which a claimant may be eligible for a medical monitoring award.

A proper "trigger" analysis requires access to information from numerous sources, particularly scientific and medical experts, that is only partly available to courts.[10] Legislatures, on the other hand, are not limited to information produced by plaintiffs and defendants; if they need additional information, they may initiate information gathering (*e.g.*, epidemiological studies).

In the past, courts have *not* demonstrated an ability to articulate specific or consistent eligibility requirements for medical monitoring. The Second Circuit's vague and ambiguous "standard" in this case illustrates this point well:

[10] In addition, in the absence of plaintiff-produced evidence it is unfair to assign to individual defendants the costs of investigating the "public benefit" of monitoring and treatment for exposures.

> Buckley suffered a substantial impact from asbestos that has significantly increased his risk of contracting an asbestos-related disease and . . . Buckley should receive medical monitoring in order to ensure early detection . . . .

Buckley, 79 F.3d at 1347.[11]

By way of contrast, Congress and state legislatures have devised effective "triggers" for programs that address and rectify public concerns. For example, the federal Occupational Safety and Health Act, 29 U.S.C. §§ 651-78, and its extensive implementing regulations clearly define permissible exposure levels for hazardous substances used in the workplace and provide for surveillance procedures to determine whether workplaces exceed those levels.[12] In other legislation,

[11] *See also Ayers v. Township of Jackson*, 525 A.2d 287, 309, 312 (N.J. 1987) (monitoring appropriate when "there is a significant but unquantified risk of serious disease" such that monitoring is "reasonable and necessary"); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 788 (3d Cir. 1994) (monitoring appropriate when there is a "significantly increased risk to plaintiff of contracting a serious disease" such that "periodic testing is reasonably necessary"); *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993) (to recover there must be a "significant, but not necessarily, likely risk of disease" that makes the need for monitoring "reasonably certain").

[12] *See, e.g.*, 29 C.F.R. § 1910.1001(d), (1) & App. H (July 1, 1995) (regulations regarding occupational asbestos exposure). In addition, the federal government formed the United States Preventive Services Task Force, which performed an exhaustive study and published recommendations concerning the effectiveness of clinical preventive services. *See* Lee Radford, *Medical Monitoring Claims: A Review of the Guide to Clinical Preventive Services*, Toxic L. Rep. 1302 (1996). The latest culmination of the Task Force's efforts is

Congress has provided for medical monitoring.[13]

Vague and ambiguous medical monitoring "triggers," such as the one set forth by the Second Circuit in this case, do not give the public "fair notice" of medical monitoring eligibility requirements. The resulting uncertainty will inevitably lead to inconsistent decisions among jurisdictions, causing disparate treatment of similarly situated plaintiffs. It will also result in costly litigation as parties seek to clarify their rights and duties.[14]

B. Legislatures Are In The Best Position To Ensure That Medical Monitoring Awards Serve Their Intended Purpose.

A second problem which arises when medical monitoring is awarded by courts, as opposed to legislatures and administrative agencies, is that courts cannot ensure that parties receiving awards will actually use them to procure monitoring.

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the 1996 *Guide To Clinical Preventive Services* (2d ed. 1996). This publication provides, *inter alia*, a "trigger" for determining whether and how medical monitoring should be conducted to detect disease.

[13] For instance, Congress created The Agency for Toxic Substances and Disease Registry, which in specific circumstances may initiate "medical testing . . . of population subgroups to screen for diseases." 42 U.S.C. § 9604(i)(9)(A).

[14] A lack of consistency and specificity in judicially created eligibility standards has proved disastrous in the asbestos litigation. Trials have essentially become "games of chance," because of the lack of clearly delineated standards for recovery. Even when similarly situated plaintiffs have tried their cases in the same jurisdiction, awards have been inconsistent. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1852-1859 (1992).

In most medical monitoring cases, plaintiffs seek,[15] and are granted, lump sum awards.[16] Yet, courts cannot dictate how damages recipients will spend a lump sum award.[17] The medical monitoring award itself is not appropriately monitored, so there is no assurance that the award, however large, will be used to help a person learn about the onset of avoidable disease.

Legislatures have the power to design medical monitoring programs that provide appropriate testing,[18] and to ensure that damage awards, from whatever source, are actually used to pay the expense of medical monitoring. Courts and commentators alike have advocated the use of periodic payment plans to secure the efficient, fair, and proper allocation of medical monitoring awards.[19]

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[15] *See, e.g., Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986); *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847 (M.D. Pa. 1988).

[16] *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 533 (1983). Moreover, it is doubtful that courts have the discretion to award other than lump sums in tort actions. *See Frankel v. United States*, 321 F. Supp. 1331, 1341 (E.D. Pa. 1970), *aff'd sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); *Lozada ex rel. Lozada v. United States*, 140 F.R.D. 404, 416 (D. Neb. 1991), *aff'd*, 974 F.2d 986 (8th Cir. 1992).

[17] *See, e.g., Ayers*, 525 A.2d at 314.

[18] *Cf.* 29 U.S.C. §§ 651-78.

[19] *See, e.g., Ayers*, 525 A.2d at 314; Amy B. Blumenberg, *Medical Monitoring Funds*, Hastings L.J. 661, 683 n.112 (1992) (*citing* numerous commentators).

C. Legislatures Are In The Best Position To Ensure That Medical Monitoring Is Only Used When It Confers A Real Benefit.

Third, medical monitoring should be used only if the benefits of testing outweigh the costs.[20] An appropriate cost-benefit analysis in the context of medical monitoring requires the decisionmaker to consider a host of complex and intricately intertwined factors that courts may not have the resources to formulate or weigh.

For example, the decisionmaker should be required to assess the accuracy of each proposed monitoring test to determine that it is reliable. That assessment should entail an analysis of prevalence (*i.e.*, the proportion of the population with the suspect condition) and the proposed test's scientific sensitivity, specificity, and positive and negative predictive value.[21] Without this assessment, the decisionmaker will not be able to discern risks inherent in the testing procedure, such as the incidence of false positives and false negatives—incorrect test results that can induce destructive psychological reactions, and in the case of false positives, lead to additional testing and treatments that carry a number of additional risks.[22] This single example illustrates the complexity of the cost-benefit analysis essential to permit a meaningful medical monitoring remedy.

As this Court can appreciate, access to a substantial amount of complex, scientific information is im-

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[20] *See Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 981 (Utah 1993).

[21] *See* Lee Radford, *Medical Monitoring Claims*, *supra* note 12, at 1304.

[22] *See id.*

perative to the analysis. Legislatures, with their broad investigative powers and resources, are in a better position than courts to acquire and consider this information.

D. Administrative Burdens Detract From Judicial Supervision Of Medical Monitoring.

Finally, courts are not equipped to handle the administrative procedures needed to ensure that medical monitoring remedies serve their limited purpose. Implementation and administration of a sound plan will require, at a minimum: specifying the nature and amount of benefits available, specifying the source of funding and funding allotments, defining procedures for determining eligibility for monitoring, defining when eligible parties may join the program, and determining program duration and how it will be implemented (*e.g.*, formal versus informal facility testing; designated service provider versus participants' chosen provider).[23] Moreover, as the program matures, its scope and administrative operation inevitably will require change, especially if the program designer erroneously estimates funding needs or the number of eligible participants.[24]

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[23] *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-272 (1994); Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1985-1986 (1992).

[24] For example, a court-guided trust set up to administer asbestos claims against the Johns-Manville Company "settled [only] 25,000 out of more than 140,000 claims [before] deplet[ing] its funds." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *supra* note 2, at 25.

A further administrative issue arises if third-party payment plans overlap with the medical monitoring program. If an eligible party's monitoring is already covered by a health care insurer[25] and there is no proof of injury, a basic public policy question arises as to whether the "collateral source rule" should apply. Under the rule, benefits received by a claimant from health or medical insurance, disability insurance, workers' accident compensation benefits, and government benefits, in legal terms are deemed "collateral" to the tortfeasor, since the tortfeasor did not pay for them, and are not deducted in calculating the amount of the claimant's alleged damages.[26] Extension of this rule beyond traditional tort law where

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[25] Approximately eighty percent of all standard medical testing is paid for by third-party insurance. *See* American Law Institute, 2 *Enterprise Responsibility For Personal Injury—Reporters' Study* 379 (1991).

[26] *See* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966). A plaintiff, however, does not necessarily recover double when the collateral source rule is applied. Health insurance contracts, for example, may provide that the insurer is to be subrogated to the insured's tort claim. *See* John Wade, *et al.*, *supra* note 1, § 2 at 522. There has been substantial criticism of the collateral source rule. *See* American Law Institute, *supra* note 25, at 161-182 (recommending abolition of collateral source rule, except with respect to life insurance); Victor E. Schwartz, *Tort Law Reform: Strict Liability And The Collateral Source Rule Do Not Mix*, 39 Vand. L. Rev. 569 (1986). Recent data suggests that use of the "collateral source" rule contributes to inflated damages claims. *See* Steven Carroll and Allan Abrahamse, *The Costs Of Excessive Medical Claims For Automobile Personal Injuries* (RAND Institute For Civil Justice, March 1995). *See also* Jeffrey O'Connell, *Must Health And Disability Insurance Subsidize Wasteful Injury Suits?*, 41 Rutgers L. Rev. 1055 (1989).

someone is harmed, to a brand new claim where an individual suffers no harm, is inappropriate and against public policy.[27]

CONCLUSION

Courts, in accord with constitutional dictates, are not well-structured to devise and supervise medical monitoring remedies. Legislatures, on the other hand, not only have the authority to confront and resolve the broad public policy tort issues raised by medical monitoring, but they also have the necessary tools to do so in a sound manner—access to nearly limitless sources of information and the ability to initiate legislation prospectively. The inappropriateness of a court acting on a matter of legislative priority is particularly acute where the legislative body, in this instance Congress, has created the basic remedy and, if it desires to do so, can amend it.

For these reasons, the petition for a writ of certiorari should be granted and the decision of the Second Circuit should be overturned.

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[27] *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W.Va. 1990) (the costs of monitoring awards to asymptomatic plaintiffs could "devastate" defendants), *aff'd*, 958 F.2d 36 (4th Cir.), *cert. denied*, 502 U.S. 1033 (1992); *Ayers*, 525 A.2d at 297 (township liable for over $8,000,000 in monitoring costs). The rule's application becomes more suspect when the eligible party's monitoring tests are no different than those that third parties should submit to who are not at a higher risk for disease. *See Potter*, 863 P.2d at 825; *Redland Soccer Club v. Dep't of Army*, 55 F.3d 827, 848 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). In these circumstances the collateral source rule should not apply, and the eligible party, or his insurer, should bear the testing expense. *Id.*

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Dated: September 30, 1996

MOTION FILED
SEP 30 1996

(8)

No. 96-320

IN THE

Supreme Court of the United States

October Term, 1996

METRO-NORTH COMMUTER RAILROAD,
Petitioner,

vs.

MICHAEL BUCKLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER'S PETITION FOR CERTIORARI

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**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE DEFENSE RESEARCH INSTITUTE
IN SUPPORT OF PETITIONER'S
PETITION FOR CERTIORARI**

Pursuant to Rule 37.4 of the Supreme Court Rules, the Defense Research Institute moves for leave to file the attached Brief of Amicus Curiae in support of Petitioner. Consent of the Petitioner, Metro-North Commuter Railroad Company, has been granted. Consent of the Respondents has been requested by letter to counsel for the Respondent but has been withheld. The Defense Research Institute ("DRI") is a national organization with its membership being lawyers involved in the defense of civil litigation. DRI is the nation's largest association of civil litigation defense lawyers, whose 20,000 members are primarily attorneys in private practice who defend corporations, associations, insurance companies, governmental bodies, and individuals in various courts, administrative actions, and other civil litigation.

To the best of our knowledge, no member of DRI has a direct, monetary interest as a party to this litigation. DRI members do have an interest in the legal principles addressed by this Brief as a friend of the Court because it presents issues of national importance. While facially the issues involved in the case may appear limited to a statutory scheme (FELA), the issue is of much broader significance. Not only does FELA jurisprudence rely upon and "glean guidance" from common law developments, and perhaps because of that reliance upon common law developments, FELA jurisprudence also affects common law developments.

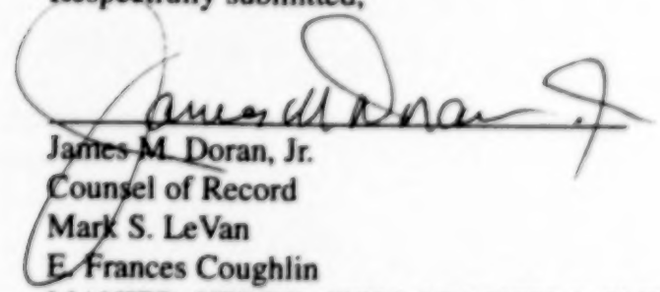
While we are said to be a nation of laws, a nation governed by the rule of law, the common law of tort liability is and has been for the last 30 years, a boiling caldron. Nowhere is that phenomenon more evident than in the tort liability concept of negligent infliction of emotional distress. With every individual, every company, and every governmental entity in America potentially a defendant in a suit seeking damages for negligent infliction of emotional distress, an injury of which the defendant has precious little ability to test the validity, there is a strong need for minimum standards to place rational limits on that potential liability. The opinion of the Second Circuit in this case discards traditionally accepted common law requirements and essentially eliminates the ability of a defendant to test the validity of a claim for which it might be liable. Therefore, the DRI has a strong interest in this Court's recognition of minimum common law requirements to establish a cause of action for negligent infliction of emotional distress.

For the foregoing reasons, DRI respectfully submits that the attached Amicus Curiae Brief will not only aid this Court in the resolution of the questions raised by the opinions below, but may also help bring this Court's

attention to the importance and effect its decision will have upon the rational development of the common law.

DRI, therefore, moves this Court for leave to file the attached brief.

Respectfully submitted,



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INTEREST OF THE *AMICUS CURIAE*

The Defense Research Institute ("DRI") is an organization with members throughout the United States numbering in excess of 20,000. It seeks to advance the cause of the civil justice system in America by insuring that the concerns of the defense bar and potential defendants are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress on select legislation impacting the civil justice system. The Defense Research Institute provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

The Defense Research Institute is interested in the outcome of this case because of the potentially large number of claims it will affect. If this Court allows the lower court's decision to stand, the end result will be that future litigants will rely upon the Second Circuit's alarming decision to try to expand tort liability in other than just FELA cases, and the door to subjective claims of emotional distress will be thrown wide open.[1]

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[1] According to the Connecticut Law Tribune, the Second Circuit's ruling that "workers could sue the railroad for asbestos exposure—even though they may be years from falling ill" will have a tremendous effect on American tort law. Steven Fromm, *The Snowmen of Grand Central*, CONN. LAW TRIBUNE, Apr. 15, 1996, at 1. The article states, "Attorney's [sic] specializing in asbestos and product liability law in Connecticut and across the country assert that the ruling is a landmark decision that may open the door for asbestos exposure cases—and other product liability cases—throughout the country." *Id.* The article goes on to report that thousands of cases (totaling 35,000 to 40,000) involving members of the Merchant Marine who charge that they were exposed to asbestos during their service over the years have been consolidated in the U.S. District Court in Philadelphia. *Id.*

SUMMARY OF ARGUMENT

The Petitioner seeks certiorari from an opinion of the Second Circuit holding, in conflict with a decision of the Third Circuit, that a plaintiff who was exposed to asbestos but had no physical injury was entitled to damages for emotional distress and medical monitoring. Petitioner raises four questions for consideration. The provisions of the Federal Employers Liability Act and the statutory requirements for recovery under that Act are set forth persuasively in the Petition and will not be addressed here. Rather, this Brief will focus on the common law requirements for a purely emotional injury. It will address the importance of the common law requirements established to test the validity and extent of emotional injury claims: (a) physical manifestation; (b) seriousness; and (c) medical or scientific evidence.

While the zone of danger test adopted by this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994) addresses who may make a claim, the Second Circuit opinion demonstrates that the Court should go further and address the minimum requirements for the type of claims that are permitted.

ARGUMENT

THIS COURT SHOULD ADHERE TO COMMON LAW MINIMUM STANDARDS FOR SCRUTINIZING EMOTIONAL INJURY CLAIMS

The Second Circuit, in its application of the "zone of danger" test adopted by this Court in *Consolidated Rail Corp v. Gottshall,* 114 S.Ct. 2396 (1994), failed to impose any standards with which to test the validity of emotional injury claims. This Court should not allow the Second Circuit's decision to stand and should adhere to common law minimum standards for scrutinizing negligent infliction of emotional distress claims.

When this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994) adopted the "zone of danger" test, it noted several concerns stemming from emotional distress claims potentially creating "infinite liability" to an "infinite number of persons." *Id.* Any number of people may suffer emotional distress which "may occur far removed in time and space from the negligent conduct..." *Id.* at 441. It is more difficult to predict the existence and degree of mental injury. *Id.* In short, the *Gottshall* court's concerns were based on the difficulty in determining *who* suffers *compensable* mental suffering.

Based on these same concerns, "[t]he common law consistently has sought to place limits on this potential liability by restricting the class of plaintiffs *who* may recover and the *types* of harm for which plaintiffs may recover."[2] *Id.* at 2405 (emphasis added). Through its adoption of the "zone of danger" test, *Gottshall* followed the common law tradition by placing limitations on those who may recover, but the opinion of the Second Circuit in this case demonstrates that this Court should go further.

By narrowly defining who can bring a mental injury claim, the "zone of danger" test resolves the common law's and *Gottshall's* concerns over such claims creating an "unlimited number" of potential plaintiffs, but because the Court failed to define which mental injuries are compensable, the "zone

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[2] Although courts have begun to recognize claims for negligent infliction of emotional distress, "concerns over the possibility of a flood of litigation and the need to limit liability in proportion to the defendant's culpability led courts to develop threshold tests to determine the validity of claims for emotional distress." J. Mark Appleberry, *Negligent Infliction of Emotional Distress,* 21 AM.J.L.&MED. 301 (1995) (examining the current state of the law governing negligent infliction of emotional distress claims).

of danger" test was interpreted by the Second Circuit to allow a plaintiff to recover for any injury, no matter how trivial. *Buckley v. Metro-North Commuter Railroad,* 79 F.3d 1337 (2nd Cir. 1996) (holding that a plaintiff may recover for pure emotional injuries with no accompanying physical injury or objective proof of the mental injury). The "zone of danger" test dams the "veritable flood of litigation," but its failure to establish a standard for compensable mental distress creates substantial "cracks."

These "cracks" of potentially "unlimited liability" are caused by the difficulty in determining the existence and the extent of emotional distress. An individual may genuinely, but wrongly, believe that he or she suffers mental injury as a result of an act of negligence. *Payton v. Abbott Labs.,* 386 Mass. 540, 546, 437 N.E.2d 171, 175 (1981). Recognizing the ability of the human mind to play tricks upon itself, as easily as people are able to deceive one another, courts "continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered mental distress." *Id.* This Court should also continue to adhere to the common law and its traditional indicia of harm.

The common law has undergone significant upheaval in recent years with respect to claims for negligent infliction of emotional distress.[3] Many courts have abandoned the traditional tests of requiring "physical impact"[4]

[3] Legal scholars addressing the issue state, "the case law in the field [of negligent infliction of emotional distress] is in an almost unparalleled state of confusion." Leslie Benton Sandor & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment,* 37 ARIZ. L. REV. 1247, 1249 (1995).

[4] According to John L. Ropiequet, "Due to judicial stretching of the physical impact or injury requirement, its practical effect in many jurisdictions is virtually meaningless." John L. Ropiequet, *Emotional Distress Claims in Medical Malpractice Cases,* FOR THE DEFENSE, April 1990 13, 13.

[5] The "foreseeability" approach or "relative bystander" test was first utilized by the California Supreme Court in *Dillon v. Legg,* 441 P.2d 912 (1968). After the Dillon ruling, the California courts began to experiment with the ruling and to expand liability. Finally, the California Supreme Court "put an abrupt halt to expansive readings of the *Dillon* rule in *Thing v. La Chusa,* 48 Cal. 3d 644, 257 Cal. Rptr. 865 (1989), ending 20 years of experiments and disagreement in the lower courts by returning to a literal reading of the elements set forth in *Dillon.*" John L. Ropiequet, *Emotional Distress Claims in Medical Malpractice Cases,* FOR THE DEFENSE, April 1990 13, 18. The *Thing* Court "drew what it admitted were arbitrary lines to limit liability and establish firm rules by changing *Dillon's* guidelines' into positive rules of law." *Id.* The significance of this reversion back towards a more conservative approach is that California retreated away from a liberal, expansive view of emotional tort liability. The California courts' search for concrete guidelines demonstrates the need for substantial certainty in the law of negligent infliction of emotional distress.

or that the plaintiff be in the "zone of danger." Some of the more liberal tests are known by a variety of names, such as "foreseeability"[5] and "general negligence."[6] Many different names and methods of limiting these claims exist, but the purpose remains the same.[7] However the test is formulated in a specific jurisdiction, the fundamental, overriding concern among the courts is that there must be some minimum standard for recovery of purely emotional distress claims where there is no physical injury. *See, e.g., R.J. v. Humana of Florida, Inc.,* 652 So. 2d 360 (Fla. 1995); *Hammond v. Central Lane Communications Ctr.,* 312 Ore. 17, 816 P. 2d 593 (1991); *Ob-Gyn Assc's of Albany v. Littleton,* 259 Ga. 663, 386 S.E. 2d 146 (1989); *Garrison v. Medical Ctr. of Delaware,* 581 A. 2d 288 (Del. 1988); *Deutsch v. Shein,* 597 S.W.2d 141, (Ky. 1980).

Because the more liberal tests create substantial "cracks" in the dam of the "veritable flood of litigation," most jurisdictions impose additional standards with respect to the types of emotional injury which may be compensated. Many that follow the "zone of danger" or "relative bystander" tests also require that a plaintiff demonstrate "physical manifestation" of an alleged emotional injury, that is, a physical injury or effect that is the direct result of an emotional injury, in order to recover. Gottshall, 114 S.Ct. At 2407, n. 11 (citing *Garvis v. Employers Mut. Casualty Co.,* 497 N.W.2d 254 (Minn. 1993)).

Other courts, including courts that have expanded to the "general negligence" approach, have recognized the requirements that the emotional injury be "serious" or "severe." *Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996); *Burgess v. Superior Court,* 2 Cal. 4th 1064, 831 P.2d at 1197, 1200 (1992); *Shultz v. Barber Glass Co.,* 4th Ohio St.3d 131, 447 N.E.2d at 109, 113 (1983) ("we hold that a cause of action may be stated for the negligent infliction of serious emotional disturbance without a contemporaneous injury"); *St. Elizabeth Hosp. v. Garrard,* 730 S.W.2d 649, 653 (Tx. 1987)

[6] The most recent jurisdiction to address this issue is the State of Tennessee. Upon surveying the law and addressing the significant policy concerns, the Tennessee Supreme Court recently adopted a "general negligence" approach towards these types of claims. *Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996).

[7] Courts have addressed the substantial public policy concerns stemming from these types of cases. For example, in *Ball v. Joy Technologies, Inc.,* 958 F.2d 36 (4th Cir. 1991), the Fourth Circuit affirmed the district court's grant of the defendant's motion for summary judgment, finding that the "plaintiffs had not sustained any physical injury from their exposure to toxic chemicals and having suffered no physical injury, the common law of West Virginia and Virginia would not allow them to recover damages for emotional distress or the costs of medical surveillance." Id. At 37. The district court emphasized the policy considerations behind its decision:

(stating that "freedom from severe emotional distress is an interest which the law should serve to protect.") The reason for these standards for compensable mental injury "is to guard against the litigation of trivial or fraudulent claims." *Burgess,* 831 P.2d at 1200 n. 6.

The Second Circuit's decision represents a relaxation of the traditional standards of tort liability and an expansion of liability for negligent infliction of emotional distress.[8] The Second Circuit analysis uses no minimum standards to test the genuineness of alleged negligent infliction of emotional distress claims. It is submitted that the Second Circuit's decision, if allowed to stand, will be relied upon by untold numbers of future litigants in FELA, Jones Act, products liability and other common law cases for its expansive holding and the dangerous precedent it sets. The Second Circuit's decision demonstrates that this Court should hold that the law provides minimum standards for testing the genuineness of such claims.[9]

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the cost of future or medical monitoring in a civil action could potentially devastate the court system as well as defendants. Again, this is not to say that defendants who have caused such exposure should not pay the price. Certainly, theoretically both justice and common sense dictate that they should, however, practically there must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs being remediless. Thus, to prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the whens and ifs individuals will be allowed recovery for a wrong committed against them.
>
> *Ball v. Joy Technologies,* 755 F. Supp. 1344, 1372 (S.D.W.Va. 1990).

[8] According to the Restatement (Second) of Torts, "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." RESTATEMENT (SECOND) TORTS 436A (1965) (emphasis added).

[9] For example, James F. Early, a partner in New Haven's Early, Ludwick & Sweeney which handles similar cases, recently stated, "what is significant about this case is that you may be able to bring a lawsuit at an earlier date, rather than waiting until you have some objective evidence in the form of an x-ray, a breathing test, before the actual physical manifestation." Steven Fromm, supra, note 1. The potential for future litigants to be able to bring a lawsuit without possessing any objective evidence of the claim is a frightening proposition for our judicial system.

A. THERE SHOULD BE A REQUIREMENT OF SOME PHYSICAL MANIFESTATION OF THE DISTRESS

The interests of justice require adoption of a bright-line rule establishing the standard for compensating mental injuries. The "genuineness" of the claim can best be addressed by the physical manifestation requirement.[10] Emotional distress without physical consequence is unlikely to be serious and, more probably, is "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants." RESTATEMENT (SECOND) OF TORTS, 436A cmt.b (1965). Moreover, emotional distress is easily imagined and feigned. The modern medical community has long accepted the correlation between mental illness and physical manifestations.[11] RESTATEMENT (SECOND) OF TORTS, 436A cmt.b (1965). Finally negligence is not so great a fault as to require the imposition of liability for purely mental injury. RESTATEMENT (SECOND) OF TORTS, 436A cmt.b (1965).

Undoubtedly, there will be cases where serious mental injury is not accompanied by physical harm, but these are in the minority. *Payton v. Abbott Labs.,* 386 Mass. 540, 555, 437 N.E.2d 171, 180 (1981). Allowing recovery simply because these cases exist is not rational or justifiable. *Id.* at 556, 180. Emotional distress without physical manifestation is not a reasonably foreseeable consequence of mere negligence. *Id.* Courts must refrain from burdening the judicial system and potential defendants with claims which are "trivial, evanescent, temporary, feigned, or imagined, in order to insure that occasional claims of a more serious nature receive judicial resolution." *Id.* To avoid imposing such a burden, courts should require that plaintiffs corroborate their mental distress claims with objective evidence. The best objective evidence is physical manifestation, supported by medical proof of causation.

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[10] The courts in many jurisdictions require emotional distress to be physically manifested in order to be compensable. See *Towns v. Anderson,* 195 Colo. 517 (1978) (en banc) (physical manifestations or mental illness); *Barnhill v. Davis,* 300 N.W.2d 104 (Iowa 1981) (bystander case); *Vicnire v. Ford Motor Co.,* 401 A.2d 148, 155 (Me. 1979) (illness or bodily harm "substantial and manifested by objective symptemology"); *Vance v. Vance,* 388 Md. 490, 500 (1979) ("capable of objective determination"); *Corso v. Merrill,* 119 N.H. 647, 653 (1979) (bystander case) (physical symptoms . . . susceptible to some form of objective medical determination and proved through medical witnesses").

[11] Leslie Benton Sandor and Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss,* 37 ARIZ. L. REV. 1247, 1254 (citing Nancy Levit, *Etherial Torts,* 61 GEO. WASH. L. REV. 136, 184-88 (1995), (citing studies to support the proposition that psychological stress induces physical changes, an plays a role in the onset of disease)).

B. THE PLAINTIFF'S EMOTIONAL DISTRESS MUST BE SEVERE

Even courts adopting the most liberal approaches which do not require physical manifestation of the emotional injury have maintained the requirement that the plaintiff's distress be severe. *See, e.g., Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996). For example, the Tennessee Supreme Court found that "in order to guard against trivial or fraudulent actions, the law ought to provide the recovery only for 'serious' or 'severe' emotional injury." Id. (following *Burgess v. Superior Court*, 2 Cal. 4th 1064, 831 P.2d 1197, 1200 (1991); *St. Elizabeth Hosp. v. Gerrard,* 730 S.W.2d 649, 653 (Tx. 1987)). A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Rodrigues v. State,* 472 P.2d 509, 520 (Haw. 1960); *Paugh v. Hanks,* 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (Ohio 1983); *Plaisance v. Texaco,* Inc., 937 F.2d 1004, 1010 (5th Cir. 1991); PROSSER AND KEETON ON THE LAW OF TORTS, 54, at 364-65, n. 60.

In the case before the Court, the Plaintiff provided no objective evidence that he suffered severe emotional distress. *Buckley v. Metro-North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y.). The district court properly noted that "[d]espite the emotional distress plaintiff claims, he continued working in the Grand Central Terminal even though it is undisputed that he could have transferred to any one of several asbestos-free facilities where both he and his father had previously worked." *Id.* at 3. The district court also pointed out that "even after being warned by a doctor and viewing the videotape about smoking, plaintiff continued to smoke cigarettes whenever I feel like having one.'" *Id.* These facts by no means demonstrate a person suffering from emotional distress severe enough to have a tort claim where there is no accompanying physical injury. The Second Circuit's decision allowing such a tenuous claim in this test case for 140 other plaintiffs should not be allowed to stand as precedent.

C. THE PLAINTIFF MUST PROVIDE MEDICAL PROOF OF THE DISTRESS

This Court should adhere to the traditional common law requirement that the plaintiff provide medical proof or scientific proof of the injury. The common law has steadfastly required medical or scientific proof that the

injury was caused by the event as well as the extent and permanency of the injury.[12] The requirement for medical proof not only provides causal connection, it also provides some objective measure of the genuineness and extent of the injury.

In addition, the requirement for medical evidence allows the defendant to test the validity of the plaintiff's complaint and helps the court ferret out nonmeritorious claims. *Paugh v. Hanks,* 451 N.E.2d 759, 767 (Ohio 1983) ("Expert medical testimony can assist the judicial process in determining whether the emotional injury is indeed serious.")

Even courts adopting the most liberal approaches have maintained the requirement that the claimed injury must be supported by expert medical or scientific proof. *See Camper v. Minor,* 915 S.W.2d 437, 446 (Tenn. 1996) ("Finally we conclude that the claimed injury must be supported by expert medical or scientific proof"); *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758, 766-67 (Haw. 1974) ("the plaintiff should be permitted to prove medically the damages occasioned by his mental responses to defendant's negligent act"). As pointed out in Justice Ginsberg's dissent in *Gottshall,* "[o]ur solution to this problem - a solution the Court does not explore - would be to require such 'objective medical proof' and to exclude as too insubstantial 'injury' claims lacking this proof." *Gottshall,* 114 S.Ct. at 2418 (Ginsberg, J., dissenting).

In the present case, the Plaintiff offered no medical testimony or any testimony other than his own to support his alleged emotional distress claim. In fact, the medical proof is to the contrary. The medical proof by the physician who examined the plaintiff was that the plaintiff did not display the level of concern worth even considering the need for counseling. *Buckley v. Metro North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y.)

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[12] For earlier courts, "harm" was "distress serious enough to require medical attention." *Negligence and the Infliction of Emotion Harm: A Reappraisal of the Nervous Shock Cases,* 35 U. OF CHICAGO L. REV. 512, 517 (1968) ("The medical attention in this minimum standard refers to any kind of aid, consultation, or prescription and not just psychiatric help. Admittedly, this standard is rather vague, but 'harm' is not a concept which can be defined with precision.")

CONCLUSION

Certain safeguards should be firmly established to protect against the "specter of unlimited and unpredictable liability" as this Court described the potential effect on American tort law in *Gottshall*. *Gottshall*, 114 S.Ct. at 2411. The Second Circuit's ruling, which allows a plaintiff to enter the courthouse doors with an alleged emotional distress claim without any physical manifestation or evidence of the severity of the claim or medical proof to support the claim, discards all of the important limitations placed by this Court on the class of plaintiffs that may recover for emotional injuries. *Id.* at 2405. Maintaining the requirements that the emotional injury be serious or severe and established by medical or scientific proof provides objective criteria permitting defendants to test the validity and extent of the injury for which they may be liable. It will also prevent a flood of potential claims based solely upon the plaintiff's subjective complaints.

Accordingly, *Amicus Curiae*, the Defense Research Institute, respectfully submits that the Petition for Certiorari should be granted and the decision of the Second Circuit reversed. The Court should take this opportunity to recognize established common law requirements imposed to place rational limits on recovery for negligent infliction of emotional distress and provide guidance to the lower courts.

Supreme Court, U.S.
FILED
DEC 12 1996
CLERK

No. 96-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 29, 1996
CERTIORARI GRANTED NOVEMBER 1, 1996

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RELEVANT DOCKET ENTRIES UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Michael Buckley v. Metro-North Commuter Railroad Company, No. 89-cv-7170 (S.D.N.Y.)

DATE	NO.	PROCEEDINGS
10/27/89	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $ 120.00 RECEIPT # 1965 Jury Trial Demanded (vb) [Entry date 02/03/92]
12/28/89	3	Notice of reassignment - to Judge Whitman Knapp Copy of notice and judge's rules mailed to Attorney(s) of record: Robin Grumet, John G. DiPersia . (vb) [Entry date 02/03/92]
2/9/90	4	AMENDED COMPLAINT by Nicholas Giamona , (Answer due 2/19/90 for Metro-North Commuter) amending [1-1] complaint; Summons issued. (vb) [Entry date 02/03/92]
2/9/90	5	Giamona's Amendment to cmplt (vb) [Entry date 02/03/92]
5/17/90	6	SECOND AMENDED COMPLAINT by Nicholas Giamona , (Answer due 5/28/90 for Metro-North Commuter) amending [4-1] amended complaint; Summons issued. (vb) [Entry date 02/03/92]

2/7/91	18	THIRD AMENDED COMPLAINT by Nicholas Giamona, (Answer due 2/18/91 for Metro-North Commuter) amending [6-1] amended complaint ; Summons issued. (vb) [Entry date 02/03/92]
4/8/91	20	Pltffs COMPLAINT for action 89 civ 7170-A WK (vb) [Entry date 02/03/92]
9/19/91	21	NOTICE OF MOTION by Lawrence Brown for declaration of admissibility of states investigative report (vb) [Entry date 02/03/92]
9/19/91	22	NOTICE OF MOTION by Lawrence Brown in limine regarding Metro's response to state's investigative report (vb) [Entry date 02/03/92]
1/27/93	23	MEMORANDUM by Metro-North Commuter in opposition to [22-1] motion in limine regarding Metro's response to state's investigative report, [21-11 motion for declaration of admissibility of states investigative report (la) [Entry date 02/05/92]
2/14/92	24	REPLY MEMORANDUM by Lawrence Brown re:the action 89 civ 7170-A (WK) regarding admissibility of State's investigative report (la) [Entry date 02/18/92]

4/10/92	25	ORDER granting [22-1] motion in limine regarding Metro's response to state's investigative report (signed by Judge Whitman Knapp); Copies mailed (cd) [Entry date 04/15/92]
4/22/92	26	ANSWER to Complaint by Metro-North Commuter (Attorney Richard J O'Keefe), ; Firm of: O'Keefe, Kline & McCaffrey by attorney Richard J. O'Keefe for defendant Metro-North Commuter (cd)
5/10/93	28	ORDER, that the caption of this case be changed to read as follows: Daniel Nelson v. Metro-North Commuter Railroad, 89 Civ. 7170-A (WK). (signed by Judge Whitman Knapp); Copies mailed (sc) [Entry date 05/11/93]
7/20/94	29	JOINT PRETRIAL MEMORANDUM (ae) [Entry date 07/21/94]
8/16/94	30	FOURTH AMENDED COMPLAINT by Lawrence Brown, Nicholas Giamona, Daniel Z. Nelson , (Answer due 8/29/94 for Metro-North Commuter) amending [18-1] amended complaint; Summons issued. (jr) [Entry date 08/30/94]

10/7/94	31	ANSWER by Metro-North Commuter (Attorney Richard J. O'Keeffe) to amended complaint; jury demand; Firm of: O'Keeffe, Kline & Lindgren by attorney Richard J. O'Keeffe for defendant Metro-North Commuter (kg)
10/18/94	32	Proposed Voir dire questions by Michael Buckley. (kg) [Entry date 10/19/94]
10/18/94	33	Pltff's Proposed Charges to the Jury. (kg) [Entry date 10/19/94]
12/1/94	34	NOTICE OF MOTION by Michael Buckley in limine No Return date. (kg) [Entry date 12/02/94]
12/28/94	35	REPLY MEMORANDUM by Michael Buckley re: [34-1] motion in limine (emil)
1/30/95	36	CONSENT ORDER, substituting Siff Rosen in place of O'Keefe, Kline & Lindgren as counsel for Metro-North (signed by Judge Whitman Knapp); (emil)
2/2/95	37	Supplemental Proposed Voir dire questions by Metro-North Commuter (emil) [Entry date 02/03/95]
2/2/95	38	Proposed Request to charge by Metro-North Commuter (emil) [Entry date 02/03/95]

2/6/95	39	MEMORANDUM by Michael Buckley in opposition to Metro-North's motion in limine regarding not contesting negligence (emil)
2/6/95	--	Jury trial held (emil) [Entry date 02/16/95]
2/6/95	--	Jury trial begun (dcap) [Entry date 02/15/96]
2/7/95	--	Jury trial held (emil) (Entry date 02/16/95]
2/8/95	--	Jury trial held (emil)[Entry date 02/16/95]
2/9/95	--	Jury trial held (emil) [Entry date 02/16/95]
2/13/95	--	Jury trial held (emil) [Entry date 02/16/95]
2/14/95	40	NOTICE OF MOTION by Michael Buckley in limine regarding pltff's Metro-North attendance records, Return date not indicated. (emil)
2/14/95	41	NOTICE OF MOTION by Michael Buckley in limine regarding disclosure of surveillance information and photographs Return, date not indicated. (emil)

2/14/95	42	MEMORANDUM by Michael Buckley in opposition to motion for directed verdict or for judgment as a matter of law (emil)
2/14/95	--	Jury trial held (emil) [Entry date 02/16/95]
2/14/95	--	Jury trial concluded (dcap) [Entry date 02/15/96]
3/15/95	43	MEMORANDUM OPINION #74438, This is a case brought under the Federal Employers Liability Act by one of the "snowmen of Grand Central Terminal" for negligent infliction of emotional distress caused by deft Metro-North's negligent exposure of pltff to asbestos from June of 1985 to early September 1987. Because deft had conceded negligence, the only issues at trial were causation and damage. At the close of pltff's case, deft moved for a directed verdict. Because we find that pltff failed to prove that he had sufficient impact w/ asbestos to result in a reasonable fear of developing an asbestos-related disease; and because he failed to prove that he had suffered a real emotional injury, we grant deft's motion and direct a verdict in it favor (Signed by Judge Whitman Knapp); Copies mailed. (emil)
3/21/95	44	JUDGMENT that deft's motion for a directed verdict is granted. The com-

		plaint is dismissed for the reasons stated in the Court's Opinion and Order, dated 3/15/95 (Parkison, J., Clerk); Mailed copies and notice of right to appeal. (emil) [Entry date 03/22/95]
4/5/95	45	Transcript of record of proceedings filed for dates of 2/6/95 (emil)
4/19/95	46	NOTICE OF APPEAL by Michael Buckley ; from [44-1] judgment order . Copies of notice of appeal mailed to Attorney(s) of Record: William Ballaine - (em) [Entry date 04/24/95]
5/9/95	47	Transcript of record of proceedings filed for dates of Feb. 7, 8, 9, 1995 (emil) [Entry date 05/10/95]
5/9/95	48	Transcript of record of proceedings filed for dates of Feb. 13, 14, 1995 (emil) [Entry date 05/10/95]
6/12/95	49	STIPULATION and ORDER, to supplement the record on appeal (signed by Judge Whitman Knapp). (emil) [Entry date 06/13/95]
7/14/95	50	Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [46-1] appeal by Michael Buckley (rg) [Entry date 07/18/95]

RELEVANT DOCKET ENTRIES
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Michael Buckley v. Metro-North Commuter Railroad Company, No. 95-7399 (2d Cir.)

DATE	PROCEEDINGS
4/26/95	Copy of district court docket entries and notice of appeal on behalf of Appellant Michael Buckley filed. [95-7399] Form C due on 5/1/95. Form D due on 5/1/95. (cv71)
4/26/95	Appellant Michael Buckley Form C filed, with proof of service. [95-7399] Form C deadline satisfied. (cv71)
4/26/95	Appellant Michael Buckley Form D filed, with proof of service. [95-7399] Form D deadline satisfied. (cv71)
4/26/95	Appellant Michael Buckley AMENDED Form C, filed, with proof of service. (cv71)
4/26/95	Appellant Michael Buckley AMENDED Form D, filed with proof of service. (cv71)
5/31/95	Notice of appearance form on behalf of William G. Ballaine, Esq., received. (Orig. to Calendar) (in06)
6/1/95	The CAPTION PAGE for this appeal has been AMENDED. (cv71)

6/9/95	New scheduling order number #2 filed. New record on appeal due date is 6/30/95. New appellant's brief due date is 7/7/95. New appellee's brief due date is 8/7/95. New argument week as early as 8/28/95. (FS) (cv70)
6/21/95	New scheduling order number 3 filed. New record on appeal due date is 7/14/95. New appellant's brief due date is 7/21/95. New appellee's brief due date is 8/21/95. New argument week as early as 9/11/95. [FJS] (cv71)
7/14/95	Record on appeal index in lieu of record filed. (cv74)
7/21/95	Appellant Michael Buckley brief FILED with proof of service. (cv78)
7/21/95	Appellant Michael Buckley joint appendix filed w/pfs. Number of volumes: 1. (cv78)
8/22/95	Appellee Metro-North Commuter brief filed with proof of service by mail 8/21/95. (cv70)
11/17/95	Letter received from atty W. Ballaine dated 11-10-95 informing the court of his new address. (cv71)
12/8/95	Case heard before FEINBERG, OAKES, CALABRESI CJJ. (TAPE: #97+98) (ca95)

12/12/95 Letter from counsel for the appellee METRO NORTH COMMUTER RAILROAD requesting Judge Calabresi to recuse himself received (lmc)

12/13/95 Letter from counsel for appellant MICHAEL BUCKLEY in response to appellees letter dated 12/12/95 received (lmc)

12/18/95 Letter received from counsel for appellees, in reference to appellant's letter. cc: panel. (cv70)

4/1/96 Judgment of the Southern district court is VACATED & REMANDED by published signed opinion filed. (JLO) [95-7399] (cv71)

4/1/96 Judgment filed. (cv71)

4/8/96 Appellee Metro-North Commuter motion to extend time to file petition for rehearing until 4-22-96 FILED (w/pfs). [783714-1] (to AA) (cv71)

4/15/96 Notice of appearance form on behalf of Sheila L. Birnbaum, Esq., received. (Orig. to Calendar) (in01)

4/15/96 Appellee Metro-North Commuter defective petition for rehearing filed. Notice sent to party to correct by 4-29-95. Problem: petition includes district court decision. (cv71)

4/19/96 Order FILED GRANTING motion for extended time to file petition for rehearing with suggestion for rehearing in banc [783714-1] by Appellee Metro-North Commuter, until April 22, 1996, endorsed on motion form 4/8/96. (JLO, CJ). (ag40)

4/22/96 Notice to counsel re: Motion order filed 4/19/96 granting motion for extension of time to file petition for rehearing and suggestion for rehearing. (ag40)

4/23/96 Appellee Metro-North Commuter defective petition for rehearing cured. Satisfy defective document response due. (cv71)

4/23/96 Appellee Metro-North Commuter Petition for rehearing, petition for rehearing in banc [790251-2] with proof of service filed. (cv71)

7/10/96 Order FILED DENYING petition for RE-HEARING [790251-1] by Appellee Metro-North Commuter, endorsed on motion dated 4/23/96. , DENYING petition for rehearing in banc [790251-2] by Appellee Metro-North Commuter, endorsed on motion dated 4/23/96. (cv71)

7/16/96 Appellee Metro-North Commuter motion to stay the mandate FILED (w/pfs). [828769-1] (cv71)

7/31/96 Order FILED GRANTING motion to stay issuance of mandate [828769-1] by Appellee Metro-North Commuter, endorsed on motion form dated 7/16/96. (cv71)

AMENDED COMPLAINT

(Title omitted in printing)

JURISDICTION

1. This Court has subject matter jurisdiction in this case pursuant to the Federal Employers' Liability Act, 45 U.S.C. §56. Venue properly lies in this Court pursuant to 45 U.S.C. §56.

DEFENDANT

2. The defendant, Metro-North Commuter Railroad, is a railroad corporation duly established by law, and having a usual place of business in New York, New York.

PLAINTIFF

3. The plaintiff, Michael Buckley is of Belle Harbor, New York, and is employed by the defendant Railroad as a pipefitter.

FACTS

4. During all the times herein mentioned, the defendant was a common carrier engaged in the business of interstate commerce, and as such operated a railroad in such business between New York, New York, and New Haven, Connecticut.

5. At the time the plaintiff received the injuries complained of, he was employed by the defendant Railroad.

6. At the time the plaintiff received the Injuries complained of, the defendant Railroad was engaged in interstate commerce and the plaintiff was employed in furtherance of said commerce.

7. Beginning at or about 1985 and extending up to the present, the plaintiff was engaged in his duties as an employee at or about Grand Central Terminal, New York, which yards, buildings, tunnels, pipes, wires, rooms, ceilings, walls, service plant, and all other facilities and structures appurtenant thereto were owned and/or operated and/or controlled and/or maintained by the defendant Railroad.

8. By no later than 1985 the defendant Railroad obtained actual or constructive notice of the danger presented by the presence of asbestos in Grand Central Terminal and the threat that working with or around asbestos posed to the health and welfare of its employees, including the plaintiff.

AS AND FOR A FIRST CAUSE OF ACTION

9. The plaintiff adopts by reference and realleges each and every allegation set forth in paragraphs 1 through 8 of this Complaint with the same force and effect as if set forth under this cause of action.

10. From at or about June 1985 to June 1988, the defendant Railroad, and its agents, servants, or employees, failed to use reasonable care to provide the plaintiff with a safe place to work in that:

a. it failed to adequately instruct, educate, train, and supervise the plaintiff regarding exposure to and handling of hazardous materials, including but not limited to asbestos;

b. it failed to adequately implement and enforce proper policies and procedures regarding exposure to and handling of hazardous materials, including but not limited to asbestos;

c. it failed to adequately test for and to monitor levels of hazardous materials, including but not limited to asbestos;

d. it failed to properly collect and dispose of hazardous materials, including but not limited to asbestos;

e. it failed to demarcate asbestos work areas;

f. it failed to limit access to asbestos work areas;

g. it failed to provide warning signs demarcating asbestos work areas;

h. it failed to ensure that asbestos waste did not accumulate on the floor or fall to the floor in employee work areas;

i. it failed to provide the plaintiff with laundry services so as to ensure that he did not carry toxic and carcinogenic materials such as asbestos out of the workplace and into his home.

11. From at or about June 1985 to June 1988 the defendant Railroad, and its agents, servants, or employees, failed to use reasonable care to provide the plaintiff with safe and suitable tools, appliances, and equipment in that:

a. it failed to provide the plaintiff with proper and adequate respirators, suits, boots, and hoods so as to

protect him from the dangers of working with or near asbestos; and

b. it failed to provide the plaintiff with laundry facilities and/or laundry equipment so as to ensure that he did not carry toxic and carcinogenic materials such as asbestos out of the workplace and into his home.

12. As a result of the negligence of the defendant Railroad, its agents, servants or employees, the plaintiff was exposed to dangerous amounts of health-threatening, life-threatening, toxic, and/or carcinogenic materials, including but not limited to asbestos, asbestos-containing materials, and asbestos-related materials.

13. As a result of the defendant Railroad's negligence, the plaintiff repeatedly was impacted by and came into physical contact with harmful amounts of hazardous material, including but not limited to asbestos, such that on repeated occasions his face, skin, and clothes visibly were coated with asbestos fibers and asbestos-containing dust and on repeated occasions he wore asbestos-coated clothing out of the workplace and into his home.

14. As a result of the defendant Railroad's negligence, the plaintiff was forced to inhale and/or ingest into the tissue of his lungs and body harmful amounts of hazardous materials, including but not limited to asbestos, asbestos-containing materials, and asbestos-related materials.

15. As a result of the plaintiff's exposure to asbestos, the plaintiff has suffered an invasion of asbestos fibers into his lung tissue and body that has initiated a scarring process in his lung tissue and body, setting in motion an injurious physical process that renders him more susceptible

to developing clinically diagnosed asbestosis, lung cancer, or other asbestos-related disease or illness.

16. As a result of the plaintiff's exposure to asbestos, the plaintiff has suffered an invasion of asbestos fibers into his lung tissue and body that has initiated a scarring process in his lung tissue and body, setting in motion an injurious physical process that more likely than not will result in a clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness.

17. As a result of the plaintiff's exposure to asbestos, the plaintiff has and will suffer mental anguish and emotional distress and anxiety due to the possibility and/or probability of contracting asbestos-related diseases and illnesses, Including but not limited to asbestosis and lung cancer.

18. As a result of the plaintiff's exposure to asbestos, the plaintiff has and will in the future incur medical expenses for the testing and monitoring of his medical condition related to his exposure to harmful amounts of hazardous materials, including but not limited to asbestos.

19. As of the filing of this Complaint, the physical process set in motion by the scarring of the plaintiff's lung tissue and body has not progressed to the point of a clinically diagnosed condition of asbestosis, lung cancer, or any other asbestos-related disease or illness, and by the filing of this Complaint the plaintiff is not bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness. The plaintiff is not seeking any damages for any clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness which may occur in the future as a result of the defendant's negligence.

AS AND FOR A SECOND CAUSE OF ACTION

20. The plaintiff adopts by reference and realleges each and every allegation set forth in paragraphs 1 through 19 of this Complaint with the same force and effect as if set forth under this cause of action.

21. The defendant Metro-North Commuter Railroad is governed by and subject to workplace safety and health standards pursuant to the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651 et seq.

22. OSHA regulations limit the amount of asbestos fibers to which a worker may be exposed, specify detailed procedures for measuring exposure, and require the use of practices and equipment to protect workers, 29 CFR §§1910.1001, 1926.58.

23. The State of New York, through its Department of Labor, has adopted the OSHA relations for the purposes of New York's workplace safety and health laws, Labor Law 27-a; 12 NYCRR §800.

24. The Federal Railroad Administration has no regulations concerning asbestos, and has declared that OSHA standards regarding environment exposure to asbestos explicitly apply to railroads and railroad employees, 43 Fed. Reg. 10583-10589 (1978).

25. From at or about June 1985 to June 1988, the defendant Metro-North Commuter Railroad ordered the plaintiff to perform work in violation of the applicable OSHA and New York State Department of Labor asbestos regulations, including but not limited to the following:

a. training, education, and maintenance program requirements, including but not limited to New York State's "Right To Know" program, New York Labor Law §875 et seq.;

b. the permissible exposure limit and the excursion limit for employee exposure to asbestos fibers in the workplace;

c. air sampling and personal air monitoring requirements;

d. proper collection and disposal of asbestos;

e. demarcation of asbestos work areas;

f. limiting access to asbestos removal areas to authorized persons;

g. providing warning signs demarcating regulated areas;

h. dealing properly with protective clothing;

i. insuring that asbestos waste did not fail to or accumulate on the floor.

26. The defendant Metro-North Commuter Railroad's violations of the above-enumerated statutes and regulations constitutes negligence per se under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq.

27. The defendant Metro-North Commuter Railroad's violations of the above-enumerated statutes and regulations caused precisely the kind of harm to the plaintiff that the statutes and regulations were designed to prevent.

28. The defendant Metro-North Commuter Railroad's violations of the above-enumerated statutes and regulations (including but not limited to New York State's "Right To Know" law) contributed to the plaintiff's harmful contact with and exposure to asbestos materials, and the plaintiff cannot be held to have been guilty of any contributory negligence pursuant to 45 U.S.C. §53.

29. As a result of the defendant Railroad's violations of the above-enumerated statutes and regulations, the plaintiff was forced to inhale and/or ingest into the tissue of his lungs and body harmful amounts of hazardous materials, including but not limited to asbestos, asbestos-containing materials, and asbestos-related materials.

30. As a result of the defendant Railroad's violations of the above-enumerated statutes and regulations, the plaintiff has suffered an invasion of asbestos fibers into his lung tissue and body that has initiated a scarring process in his lung tissue and body, setting in motion an injurious physical process that renders him more susceptible to developing clinically diagnosed asbestosis, lung cancer, or other asbestos-related disease or illness.

31. As a result of the defendant Railroad's violations of the above-enumerated statutes and regulations, the plaintiff has suffered an invasion of asbestos fibers into his lung tissue and body that has initiated a scarring process in his lung tissue and body, setting in motion an injurious physical process that more likely than not will result in a clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness.

32. As a result of the defendant Railroad's violations of the above-enumerated statutes and regulations, the plaintiff has and will suffer mental anguish and emotional

distress and anxiety due to the possibility and/or probability of contracting asbestos-related diseases and illnesses, including but not limited to asbestosis and lung cancer.

33. As a result of the defendant Railroad's violations of the above-enumerated statutes and regulations, the plaintiff has and will in the future incur medical expenses for the testing and monitoring of his medical condition related to his exposure to harmful amounts of hazardous materials, including but not limited to asbestos.

34. As of the filing of this Complaint, the physical process set in motion by the scarring of the plaintiff's lung tissue and body has not progressed to the point of a clinically diagnosed condition of asbestosis, lung cancer, or any other asbestos-related disease or illness, and by the filing of this Complaint the plaintiff is not bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness. The plaintiff is not seeking any damages for any clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness which may occur in the future as a result of the defendant's violations of the above-enumerated statutes and regulations.

AS AND FOR A THIRD CAUSE OF ACTION

35. The plaintiff adopts by reference and realleges each and every allegation set forth in paragraphs 1 through 34 of this Complaint with the same force and effect as if set forth under this cause of action.

36. At all times relevant hereto, the defendant Railroad was the employer of the plaintiff and as such exercised actual authority over the plaintiff with the power to affect his economic interests.

37. As the employer of the plaintiff, the defendant Railroad owed the plaintiff the legal duty under the FELA to exercise due care and diligence in providing the plaintiff with a reasonably safe place to work.

38. Despite the defendant Railroad's notice of and knowledge regarding the health hazards posed by the exposure of its employees to asbestos in Grand Central Terminal, the Railroad nevertheless ordered the plaintiff on repeated occasions from June of 1985 to June of 1988 to perform work which it knew exposed him to harmful amounts of asbestos.

39. The defendant Railroad was in a position to rectify such exposure of its employees to asbestos in Grand Central Terminal but failed to do so based on pecuniary considerations.

40. The defendant Railroad's deliberate disregard for the health and welfare of the plaintiff constitutes extreme and outrageous conduct within the meaning of Section 46 of the Restatement (Second) of Torts.

41. By its extreme and outrageous conduct in deliberately disregarding the health and welfare of the plaintiff, the defendant Railroad has recklessly caused the plaintiff to suffer severe emotional distress, including but not limited to mental suffering, mental anguish, fright, horror, grief, shame, anger, worry, and fear of the future.

42. As a result of the defendant Railroad's extreme and outrageous conduct, the plaintiff was exposed to dangerous amounts of health-threatening, life-threatening, toxic, and/or carcinogenic materials, including, but not limited to, asbestos, asbestos-containing materials, and asbestos-related materials.

43. As a result of the defendant Railroad's extreme and outrageous conduct, the plaintiff repeatedly was impacted by and came into physical contact with harmful amounts of hazardous material, including but not limited to asbestos, such that on repeated occasions his face, skin, and clothes visibly were coated with asbestos fibers and asbestos-containing dust and on repeated occasions he wore asbestos-coated clothing out of the workplace and into his home.

44. As a result of the defendant Railroad's extreme and outrageous conduct, the plaintiff was forced to inhale and/or ingest into the tissue of his lungs and body harmful amounts of hazardous materials, including but not limited to asbestos, asbestos-containing materials, and asbestos-related materials.

45. As a result of the defendant Railroad's extreme and outrageous conduct, the plaintiff has suffered an invasion of asbestos fibers into his lung tissue and body that has initiated a scarring process in his lung tissue and body, setting in motion an injurious physical process that renders him more susceptible to developing clinically diagnosed asbestosis, lung cancer, or other asbestos-related disease or illness.

46. As a result of the defendant Railroad's extreme and outrageous conduct, the Plaintiff has suffered an invasion of asbestos fibers into his lung tissue and body that has initiated a scarring process in his lung tissue and body, setting in motion an injurious physical process that more likely than not will result in a clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness.

47. As a result of the defendant Railroad's extreme and outrageous conduct, the plaintiff has and will suffer mental anguish and emotional distress and anxiety due to the

possibility and/or probability of contracting asbestos-related diseases and illnesses, including but not limited to asbestosis and lung cancer.

48. As a result of the defendant Railroad's extreme and outrageous conduct, the plaintiff has and will in the future incur medical expenses for the testing and monitoring of his medical condition related to his exposure to harmful amounts of hazardous materials, including but not limited to asbestos.

49. As of the filing of this Complaint, the physical process set in motion by the scarring of the plaintiff's lung tissue and body has not progressed to the point of a clinically diagnosed condition of asbestosis, lung cancer, or any other asbestos-related disease or illness, and by the filing of this Complaint the plaintiff is not bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness. The plaintiff is not seeking any damages for any clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness which may occur in the future as a result of the defendant's extreme and outrageous conduct.

WHEREFORE, the plaintiff Michael Buckley demands judgment against the defendant Railroad in the sum of One Million Dollars, plus all applicable interest and costs.

Dated: New Haven, Connecticut
August 16, 1994

(Jurat omitted in printing)

ANSWER TO AMENDED COMPLAINT

(Title omitted in printing)

The defendant, METRO-NORTH COMMUTER RAILROAD, by its attorneys, O'KEEFFE, KLINE & LINDGREN, answering the Complaint of the plaintiff, state upon information and belief:

1. As to the allegations of Paragraph "5" of the Complaint, defendant denies that the plaintiff received any physical or emotional injury compensable under the Federal Employers Liability Act.

2. As to the allegations of Paragraph "6" of the Complaint, defendant denies that the plaintiff received any physical or emotional injury compensable under the Federal Employers Liability Act.

3. As to the allegations of Paragraph "7" of the Complaint, defendant denies that it "owned" or "controlled" the structures referred to therein.

4. As to the allegations contained in the Paragraph of the Complaint numbered "8", the defendant denies that asbestos in Grand Central Terminal presented any danger to the plaintiff and the defendant further denies that working with or around asbestos posed any threat to the health and welfare of the plaintiff.

AS TO THE FIRST CAUSE OF ACTION

5. As to the allegations of Paragraph "9" of the Complaint the defendant, repeats, reiterates and realleges each and every denial to the Paragraph of the Complaint numbered

"1" through "8", set forth above, with the same force and effect as if fully set forth hereat.

6. As to the Paragraph of the Complaint numbered "10", the defendant denies that it failed to provide the plaintiff with a safe place to work; defendant further denies the allegations designated "10 a" through "10 h"; defendant admits so much of Paragraph "10 i" as alleges that the defendant did not provide plaintiff with laundry services, but specifically denies any obligation or necessity to do so.

7. As to the Paragraph of the Complaint numbered "11", the defendant denies that it failed to use reasonable care to provide the plaintiff with safe and suitable tools and appliances, and equipment; the defendant denies the allegations of Paragraph "11 a" of the Complaint; defendant admits so much of Paragraph "11 b" of the Complaint that alleges it did not provide the plaintiff with laundry facilities but denies any obligation or duty to do so.

8. The defendant denies each and every allegation contained in the Paragraphs of the Complaint designated "12", "13", "14", "15", "16", "17" and "18".

9. As to the Paragraph of the Complaint numbered "19", the defendant denies that the plaintiff has sustained any scarring to his lungs, denies the existence of any physical process allegedly set in motion by the scarring and specifically denies any "unclinically" diagnosed condition of asbestosis, lung cancer, or any other asbestos related disease or illness which the pleadings infer the plaintiff may be suffering from at the time of the filing of the Complaint; defendant further avers that the conclusory allegations in the remainder of the Paragraph "19" of the Complaint are an attempt to split a cause of action, if such cause of action exists.

AS AND FOR A SECOND CAUSE OF ACTION

10. As to the paragraph of the Complaint numbered "20", the defendant repeats, reiterates and realleges each and every denial to the Paragraphs of the Complaint numbered "1" through "19", set forth above, with the same force and effect as if fully set forth hereat.

11. As to the Paragraph of the Complaint numbered "21", the defendant denies that it is governed and subject to all portions of the Occupational Safety and Health Act (OSHA), 29 USC Section 651 et al; defendant reserves the right to admit or deny specific portions of OSHA which plaintiff may assert are applicable to the present action.

12. As to the allegations of Paragraph "22" of the Complaint, defendant admits the existence of OSHA regulations in general, but reserves the right to admit or to deny such OSHA regulations as plaintiff may claim are applicable to the present action.

13. As to the Paragraph of the Complaint designated "23" the defendant admits the existence of Labor Law 27-a; defendant reserves the right to admit or deny such portions of Labor Law 27-a as plaintiff asserts are applicable to the present action.

14. Defendant denies the allegations of Paragraph "24" of the Complaint.

15. As to the Paragraph of the Complaint designated "25", the defendant denies that it ordered the plaintiff to perform work in violation of any applicable OSHA or New York State Department of Labor Asbestos Regulations; defendant further denies the allegations designated "25 a" through "25 i".

16. As to the Paragraph of the Complaint designated "26", the defendant denies violation of any statute or regulation relevant to the within action; defendant specifically denies that violation of the statutes enumerated in general by the plaintiff in the Complaint, and the regulations enumerated in general by the plaintiff in the Complaint constitute negligence per se under the Federal Liability Employers Act.

17. Denies each and every allegation contained in the paragraph of the Complaint designated "27".

18. Denies each and every allegation contained in the Paragraphs of the Complaint designated "28", "29", "30", "31", "32", and "33".

19. As to the Paragraph of the Complaint designated "34", the defendant denies that the plaintiff has sustained any scarring to his lung, denies the existence of any physical process allegedly set in motion by the scarring and specifically denies any unclinically diagnosed condition of asbestosis, lung cancer or any other asbestos related disease or illness which the pleadings infer the plaintiff may be suffering from at the time of the filing of the Complaint; defendant further avers that the conclusory allegations in the remainder of Paragraph "34" of the Complaint are an attempt to split a cause of action, if such cause of action exists.

AS TO THE THIRD CAUSE OF ACTION

20. As to the Paragraph of the Complaint designated "35", the defendant repeats, reiterates and realleges each and every denial to the Paragraphs of the Complaint designated "1" through "34", set forth above, with the same force and effect as if fully set forth hereat.

21. Denies each and every allegation contained in Paragraphs of the Complaint designated "36", "38" and "39".

22. As to the Paragraph of the Complaint designated "40", the defendant specifically denies any "deliberate disregard for the health and welfare of the plaintiff" and the defendant railroad specifically denies any conduct which can be characterized as "extreme and outrageous" and further denies the applicability of Section 46 of the Restatement (2nd) of Torts, to the present action.

23. As to the Paragraph of the Complaint designated "41", the defendant denies each and every allegation contained therein, and specifically denies that the plaintiff herein has sustained any "emotional injury" compensable under the Federal Liability Employers Act.

24. The defendant denies each and every allegation contained in the Paragraphs of the Complaint designated "42", "43", "44", "45", "46", "47", "48" and defendant specifically denies any extreme and outrageous conduct toward the plaintiff, alleged in the foregoing numbered paragraphs.

25. As to the Paragraph of the Complaint numbered "49", the defendant denies that the plaintiff had sustained any scarring to his lungs, denies the existence of any physical process in motion by the scarring and specifically denies any "unclinically" diagnosed condition of asbestosis, lung cancer, or any other asbestos related disease or illness which the pleadings infer the plaintiff may be suffering from at the time of the filing of the Complaint; defendant further avers that the conclusory allegations in remainder of Paragraph "49" of the Complaint are an attempt to split a cause of action, if such cause of action exists.

AS AND FOR A SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE FIRST, SECOND, AND THIRD CAUSES OF ACTION

26. The facts stated in the First, Second and Third Causes of Action of the Complaint, fail to state a cause of action compensable under the Federal Employers Liability Act.

AS AND FOR A SECOND SEPARATE AND COMPLETE AND/OR PARTIAL DEFENSE TO THE FIRST, SECOND AND THIRD CAUSES OF ACTION

27. If the plaintiff sustained any injury as alleged in the First, Second and Third Causes of Action, said injury was the result of contributory negligence of the plaintiff.

AS AND FOR A THIRD SEPARATE AND COMPLETE AND/OR PARTIAL DEFENSE TO THE FIRST, SECOND AND THIRD CAUSES OF ACTION

28. If the plaintiff sustained any injury as alleged in the First, Second and Third Causes of Action, plaintiff has failed to mitigate damages in respect to the injuries claimed.

AS AND FOR A FOURTH SEPARATE AND COMPLETE AND/OR PARTIAL DEFENSE TO THE FIRST, SECOND AND THIRD CAUSES OF ACTION

29. The plaintiff's claim is barred in whole or in part by the applicable three year Statute of Limitation under the Federal Liability Employers Act.

AS AND FOR A FIFTH SEPARATE AND COMPLETE AND/OR PARTIAL DEFENSE TO THE FIRST, SECOND AND THIRD CAUSES OF ACTION

30. The duty of the defendant to provide medical testing and/or monitoring has been pre-empted and defined by OSHA. Plaintiff is entitled to any damages for medical expenses for testing and monitoring of his medical condition for alleged exposure to hazardous materials, including alleged exposure to asbestos, other than the mandated provisions of OSHA.

WHEREFORE, the defendant, METRO-NORTH COMMUTER RAILROAD, demands judgment dismissing the Complaint, together with the costs and disbursements of this action and for such other and further relief as to the Court may seem just and proper.

Dated: White Plains, New York
September 28, 1994

(Jurat omitted in printing)

EXCERPT OF TRIAL TRANSCRIPT OF FEBRUARY 8 AND FEBRUARY 9, 1995 - TESTIMONY OF STEVEN MARKOWITZ

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STEVEN MARKOWITZ, called as a witness by the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOETSCH:

Q. Are you licensed to practice medicine?

A. Yes.

Q. Whereabouts?

A. New York State.

Q. Beginning at the college level, would you tell us your educational background?

A. I went to Yale University for college where I majored in psychology. I then went to Columbia College of

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Physicians and Surgeons, which is the medical school at Columbia, and graduated from there in 1981.

Q. Did you take an internship?

A. Yes.

Q. After an internship did you take a residency?

A. Yes. In fact, two residencies.

Q. Whereabouts did you do your residency?

A. Well, I did my first internship and residency at Montefiore Medical Center in the Bronx. This was in internal medicine. And I subsequently did a two-year full-time residency in occupational and environmental medicine at Mount Sinai.

Q. Do you specialize in any particular field of medicine?

A. I am board certified in internal medicine and I specialize and am board certified in occupational medicine.

Q. Briefly, what is internal medicine?

A. This is study and care of patients who are adults and who have problems of an internal nature.

Q. What is occupational medicine?

A. Occupational medicine is the study and care of patients who have health problems or exposure at the workplace that they are worried about and the health problems derived from exposure at the workplace.

Q. What does it mean to be board certified?

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A. The professional society for a particular specialty is called a board, and each specialty has its own board.

And they set the rules for allowing people to call themselves board certified. In the case of internal medicine and in the case of occupational medicine, each board mandates that one complete a certain number of years of residency in an accredited program, so for internal medicine it was three years and for occupational medicine it is two years. Then each board also requires that the person who wants to become board certified take a national examination after completing the residency. If one passes the board examination and completes the residency in a satisfactory fashion, then one is board certified.

Q. Are you board certified in both internal medicine and occupational medicine?

A. That's correct.

Q. Why did you choose to specialize in the field of occupational medicine?

A. Well, I thought it was interesting. I thought it would remain interesting for the forty or more years that I expect to practice medicine. I also thought we had an opportunity to prevent people from getting sick; that all workplace exposures are preventable; that we can have an opportunity to identify new associations between exposure and disease and thereby not just cure people but prevent

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them from getting sick at all. I thought that was an exciting challenge.

Q. Are you on the staff of any hospital?

A. Mount Sinai Medical Center in Manhattan.

Q. Are you a member of any professional societies?

A. Yes.

Q. Would you name some of those?

A. The American Public Health Association, the American College of occupational and Environmental Medicine, and the New York Academy of Sciences.

Q. Do you hold any academic or teaching appointment?

A. I am full-time employed. I am associate professor at Mount Sinai Medical School.

Q. Does Mount Sinai School of Medicine have any division devoted to occupational medicine?

A. Yes. We have a division, one of the largest in the country, that is the division of environmental and occupational medicine.

Q. What is the history and standing of that division in the field?

A. It has a national and international reputation. It was begun in 1963 as the first hospital-based unit in environmental medicine. It was started by Dr. Irving Selikoff, the great asbestos researcher. He continued at the helm until 1985 when he stepped down and was replaced by

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one of the top people of the National Institute for occupational Safety and Health. We have got two dozen full-time faculty in occupation and environmental medicine, many of whom do research but also provide patient care and teach.

Q. What is asbestos, Doctor?

A. Asbestos is a natural mineral fiber.

Q. What is the typical size of asbestos fiber in the workplace?

A. It's small. It is usually about 5 microns. It can be 10 or 20 microns in length or it can be significantly smaller than that, 1 micron or less in length. The width is even smaller, usually in the range of .1 to .5 micron. A micron is 1 millionth of a meter. A meter is about a yard. so we are talking very, very small fibers.

Q. Can you give us an idea how many such fibers could fit on the head of a pin?

A. It depends how big the head of the pin is, but many fibers can fit into a very small space. Some of the fibers are visible, the larger ones, but the smaller ones are not visible to the naked eye and you can only examine them with the microscope.

Q. Do asbestos fibers have any particular aerodynamic features?

A. They are long and thin. There is one kind that

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is straight, another kind that is more curly, but in general even the curly ones tend to be long and thin, which means aerodynamically how they move in air is that when swept up in a windstream such as when one is breathing, they tend to enter into longitudinal arrangement. They will be parallel to the direction of the wind, or in this case the breath we are talking about people breathing in asbestos fibers so that the important and limiting quality of the asbestos in terms of breathing it in is its width, because it doesn't come in sideways. It comes in lengthwise. So that the very small width we are talking about, less than half a micron, is what is important in terms of breathing it in.

Q. Are those fibers small enough so that a human being would not necessarily recognize that you were breathing asbestos fibers or feel that he was breathing asbestos fibers?

A. That's true. I mean, larger fibers might be caught up in the mucus or in the, nasal hairs, or clumps of fibers, but the majority of fibers will be smaller than that and will pass right through and go directly into the lung.

Q. Does the field of occupational medicine include the study of asbestos's affect on human health?

A. Yes.

Q. Have there been any scientific studies of the relationship between exposure to asbestos and human health?

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A. This is the most extensively studied area in occupational medicine. There have been hundreds and hundreds of studies. There have been at least 7,000 publications on asbestos.

THE COURT: Have you memorized them all?

THE WITNESS: No, I haven't.

Q. Doctor, what is the relationship of the Mount Sinai Medical Center to the study and treatment of asbestos-related disease?

A. Well, Dr. Selikoff, whom I mentioned before, who started our unit, began his work in the late 1950s seeing people who had worked in an asbestos factory in Patterson, New Jersey. He had seen people with scarring of the lungs, called asbestosis, and with some of the cancers of the chest. Then he began really his lifelong devotion to the study and the documentation of asbestos-related disease in humans. He started the largest North American study of insulator, people who put in the asbestos on the pipes and other places, and that study in fact continues to this date. Dr. Selikoff died two years ago but the study is continuing.

In addition, under Dr. Selikoff's direction we have studied many other types of workers, including shipyard workers, sheet metal workers, and a lot of different construction trades.

Q. Do you hold any administrative position at the

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Mount Sinai Division of Environmental and Occupational Medicine?

A. I have handled the residency program in occupational medicine, so I direct the program for the physicians who specialize in occupational medicine. We have a consortium of units that train in all types of occupational and environmental health, including industrial hygiene, occupational medicine, occupational health, nursing and safety. I am the deputy director of that consortium. I am deputy director of that division, the basic division of occupational medicine and various others.

Q. Do you teach any courses in occupational medicine at Mount Sinai?

A. Yes.

Q. Are you familiar are with a governmental agency known as NIOSH?

A. Yes.

Q. What does that stand for?

A. It stands for the National Institute for Occupational Safety and Health.

Q. Have you had any involvement in NIOSH?

A. Yes. The funding for the educational programs comes from NIOSH. I have worked with NIOSH in completing a study of bladder cancer up in Niagara

Falls that occurred in a chemical factory. I am currently doing a study of the

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cost of occupational disease in the United States, again for NIOSH.

Q. Have you performed any professional activities in the field of occupational medicine for state government?

A. Yes.

Q. In what government activities have you done that?

A. In 1986, the New York State Legislature asked us to write a report and describe the extent of occupational disease in the state and how much it costs in terms of health care and lost work time. This was directed by myself and Dr. Landrum, who is head of our unit. In 1987, we issued a report talking about how many people became ill and how many people died as a result of asbestos exposure and many other types of exposure in the workplace in New York State.

After we submitted that report, the state decided that workers really didn't have enough access to expertise in occupational medicine and they established a network of clinical centers throughout the state where people can come and get an expert opinion on whether they have an occupational problem or not, whether they have an exposure that they need worry about or not. There are some eight clinical centers throughout the state now and Mount Sinai is the largest one.

After the success of that, we did a similar kind

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of study for New Jersey, and I was consulted on studies in Pennsylvania and Texas with similar-type efforts, reviewing, basically summarizing, the problem of occupational disease in a given area.

Q. Do you hold any governmental grants in the field of occupational medicine?

A. Yes.

Q. Have you received any awards regarding the teaching of occupational medicine?

A. I have an award, actually it is a grant, from the National Institute of Health Sciences, which is part of the NIH, the National Institutes of Health, and that is an award to teach medical students.

Q. Are you a member of any editorial board of scientific journals in the field of occupational medicine?

A. Yes.

Q. Which one?

A. The American Journal of Industrial Medicine, the Archives of Environmental Health. I review articles for Clinical Toxicology, a Mount Sinai medical journal. And I think there is one other but I can't recall.

Q. Doctor, what is epidemiology?

A. Epidemiology is the study of how disease is distributed in groups of people, with the aim of determining

what the causes of disease are in those groups of people.

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Q. Have you received any formal training in epidemiology?

A. Yes. As part of my residency program in occupational medicine, we did a number of courses which are equivalent to a master's in public health. But since finishing the residency, I have taken about eight or nine courses in epidemiology and biostatistics up at Columbia.

Q. In the course of your practice of occupational medicine, do you apply the principles of epidemiology on a regular basis?

A. Yes.

Q. Have you ever examined large groups of workers for occupational disease?

A. Yes.

Q. Briefly, what studies were you involved in?

A. I was involved with the sheet metal workers study. These are the people who put up sheet metal ductwork in buildings, and work near asbestos. I examined people in the teachers study, looking at whether teachers have been exposed to asbestos and any of the diseases related to asbestos. I have examined school custodians and the skilled trades within

the school system to see whether they had asbestos-related disease.

Q. Who sponsored those studies regarding the teachers and custodians?

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A. The school custodians is the New York City Board of Education. The teachers was the Environmental Protection Agency. The sheet metal, I think, was the union.

Q. Do you teach any courses in occupational epidemiology?

A. Yes. We have a course at Mount Sinai for the residents, specifically looking at the problems of occupational and environmental epidemiology.

Q. Have you authored articles dealing with epidemiology in peer review journals?

A. Yes.

Q. Doctor, are you aware of any danger to human health posed by asbestos exposure?

A. Yes.

Q. Have you studied that subject?

A. Yes.

Q. Have you given lectures and taught courses involving asbestos-related diseases?

A. Yes.

Q. Have you published any articles in medical journals?

A. Yes.

Q. Did any of those concern asbestos-related diseases?

A. Yes.

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Q. Which one was that?

A. In particular -- this is a group I forgot to mention before -- we studied firefighters, New York City firefighters and fire officers, to determine whether they had enough exposure to asbestos to cause problems.

Q. Did the Mount Sinai Division of Environmental and occupational Medicine have a clinic where patients can be examined and treated?

A. Yes.

Q. Do you examine and treat patients at that clinic?

A. Yes, I do.

Q. How many patients a year do you examine and treat regarding exposure to asbestos?

A. Probably 30 or 40 per year now, I would say.

Q. Over the course of your career, how many patients have you examined or treated regarding exposure to asbestos, would you say?

A. Oh, many hundreds, probably somewhere between five hundred and a thousand.

Q. Have any state and federal governmental agencies referred patients to you for asbestos-related examinations?

A. Yes.

Q. What state and federal agencies?

A. The Worker's Compensation Board within New York State, and I believe the office for worker's compensation

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program at the federal level which takes care of shipyard workers.

Q. Do other medical doctors refer patients to you for asbestos-related examination?

A. Yes.

Q. Do attorneys refer individuals to you for, asbestos-related examinations?

A. Yes.

Q. What procedures do you follow when a person is referred to you for an asbestos-related exam?

A. I spend a lot of time talking with the patient about their history, their health problems. In particular, I concentrate on their occupational history, what kind of work they have done throughout their lifetime and what kind of exposures are entailed. I perform a physical examination. I order up certain tests. I spend time educating the patient about asbestos and what behaviors a person can undertake to protect their health in the future.

MR. GOETSCH: Your Honor, could we have a brief sidebar?

THE COURT: Yes.

(At the sidebar)

MR. GOETSCH: The other expert who is going to testify in this case is Dr. Nicholson, and he just came into the courtroom. His expert opinion is going to be based in

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part on Dr. Markowitz's testimony and opinion. They work together, and he relies on Dr. Markowitz's findings and opinions as part of his. He is an expert witness. So I ask that he be allowed on stay in the courtroom and hear Dr. Markowitz's testimony.

MR. LANDMAN: I strongly object to that because it is going to come out that these two people get together all the time and do this. I think, your Honor, it is very unfair. They have him sitting here and hearing direct and cross of this doctor which is going to be the same as the cross of the other doctor. They have had plenty of time to work in the same building; they have had plenty of time to discuss the opinion. Just because he is bringing the opinion out in front of the jury doesn't mean he doesn't know about the opinion.

THE COURT: I will exclude him.

(In open court)

Q. Doctor, does your procedure for examining persons referred to you for asbestos-related disease change at all depending on whether the individual is referred to you by the federal government, a state government, other medical doctors, or an intern?

A. None. I do the same test, ask the same questions, and write the same report.

Q. Doctor, do you consider yourself as having

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expertise on the effect of workplace exposure to asbestos on the health of workers?

A. Yes.

Q. Have you ever been qualified as an expert witness regarding the effects of asbestos exposure in the workplace on the health of workers?

A. You mean in a courtroom?

Q. Yes.

A. Yes.

Q. Doctor, have any attorneys who represent asbestos defendants ever referred cases to you for your review and evaluation?

A. No.

Q. Are you willing to conduct such a review and evaluation for asbestos as to defendant?

A. If it is a reasonable case, meaning if there is a reasonable likelihood of exposure and disease, which is the same criterion I use for all potential patients.

Q. Prior to this case, Doctor, have you ever testified on behalf of a patient that my firm was representing?

A. No.

Q. Prior to this case, have we ever met before?

A. No.

Q. Do you have a professional fee that you charge

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for the time that you spend testifying?

A. Yes.

Q. What is the amount of that fee?

A. $300 an hour.

Q. Doctor, may I ask you to explain --

THE COURT: Are you presenting him as expert?

MR. GOETSCH: Yes, your Honor.

THE COURT: Do you want voir dire?

MR. LANDMAN: Just very briefly, if I could, your Honor, a couple of minutes.

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. LANDMAN:

Q. Doctor, you have only written one article about asbestos, isn't that right?

A. One article that relates strictly to asbestos.

Q. Doctor, you were asked some questions about your involvement with asbestos. Why don't you tell the jury how it is you first got involved in being qualified as an expert witness in asbestos litigation?

A. I was called, I received a phone call and was asked whether I was willing to review a case.

Q. Doctor, did you take any affirmative steps to actually go out and find cases where you could review and testify?

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THE COURT: I think this is cross-examination.

MR. LANDMAN: All right. I have no problem, your Honor, with the doctor being qualified as a specialist in occupational medicine. I will reserve this for cross. That is fine, your Honor.

THE COURT: Let me tell you what all this means. Ordinarily a witness is only allowed to testify to what he or she saw or smelled, heard, observed with his or her senses in one way or another. There are exceptions to the rule. But everything else is called hearsay, and you can't testify to hearsay unless there is some specific reason why you are allowed to. One of those specific reasons is if you are qualified as an expert. When I qualify him as an expert, which you just heard me do, that means that he is entitled to express an opinion about facts that he is told about, that he doesn't necessarily know of his own knowledge. He can express an opinion.

The fact that I qualify him as an expert doesn't mean that you have to think he is an expert. But you make your own decision about that, and then you make your own decision about what weight you will give to his testimony.

MR. GOETSCH: Thank you, your Honor.

DIRECT EXAMINATION CONTINUED

BY MR. GOETSCH:

Q. Doctor, does asbestos exposure cause disease in

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human beings?

A. Yes, it does.

Q. What are the broad categories of the type of disease that asbestos causes?

A. There are two categories: one is scarring and the other is cancer.

Q. Are you familiar with the cancer entitled mesothelioma?

A. Yes, I am.

Q. What is mesothelioma?

A. Mesothelioma is a cancer of the pleura, which is the lining, the outer covering of the lung, or of the similar kind of layer or covering of tissue that covers the abdomen. The mesothelioma in the chest, which is a cancer, is called pleural mesothelioma, and the mesothelioma in the abdomen is called peritoneal mesothelioma. The pleural mesothelioma is not the same as lung cancer. Lung cancer is cancer of the lung tissue, whereas pleural mesothelioma is a cancer of this tissue, which is a very thin, normally very thin, in its undiseased state, covering of the lung.

Q. Doctor, if it would assist you in explanation, would you refer to an anatomical model of the lung to show us where mesothelioma cancer develops?

THE WITNESS: May I stand up to show this?

THE COURT: Sure.

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A. This is a model showing the respiratory system. Just to orient you, the head goes up here, and the abdomen and the rest of the body go down here below. So from top to bottom, what you are looking at is the trachea, the windpipe, where the air travels down into the lung. There are certain parts here that are removable that I am holding on. But the chest consists of two major organs: the heart and the lungs. This putty-looking material here is the lungs, and then when you expose here the left side you can see the heart, which is not relevant to mesothelioma. Asbestos does not affect the heart directly.

Then we remove the other side here, the right side, and you see the inner part of the lungs.

Now, the pleural tissue that I mentioned, the pleura, is a very thin Saran-wrap-like layer of tissue, which is on the outside of the lung. They are all surfaces of the lung tissue. So it is a lung here. It is on the right side here. It is underneath here as well.

What is not shown just below here is the diaphragm, the muscle below the lungs which help you breathe. So the pleura relating to the diaphragm is between the diaphragm and the lungs. The pleura is not inside the lung at all; it is the covering tissue outside the lung.

It is normally very thin. In fact, you can barely recognize it as a distinctive layer here, separate

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from this pinker material which is the inside, which is the lung tissue itself, what we call the lung parenchyma. The pleura doesn't usually become diseased. It can become scarred or developed cancer. The scar -- we will get into.

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Q. Is there any known cause of mesothelioma in human beings?

A. Yes.

Q. What is that cause?

A. Asbestos.

Q. Does smoking cigarettes cause mesothelioma cancer?

A. No, it does not.

Q. Are you familiar with the term, "latency period"?

A. Yes.

Q. What is a latency period?

A. The latency is the gap in time between exposure, when a person receives their exposure to a toxin and development of the disease.

Typically, with chronic diseases such as cancer, the latency period for an environmental cancer-causing chemical is usually 20, 30, or 40 years. That means if you count the time when the person is first exposed to the chemical to the time when they develop the cancer, it is typically 20 or 30 or 40 years. A person does not develop the problem right away. It occurs only after a period of time. That period of time is called latency.

Q. What is the latency period for mesothelioma?

A. Mesothelioma, the average latency is 35 or 40

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years, meaning on average it is that much time that passes between the time the person is first exposed to asbestos and when they develop the cancer.

If a person is first exposed at age 30, on average they wouldn't get the mesothelioma until age 65. Now, it

might be age 70, it might be age 60, in fact, it might be age 45, but on average it is a long period of time. It is 35, 40 years.

Q. After an individual has been exposed to asbestos, does the risk of developing mesothelioma remain level over the years or does it increase over time?

A. It increases over time. You don't see mesotheliomas within the first few years after beginning exposure to asbestos. You only see it after some period of latency.

With time that risk increases so that the risk of getting mesothelioma, say, 30 to 40 years after exposure to asbestos is greater than, say, 15 or 20 years after first being exposed to asbestos. it increases to at least 35 or 40 years.

Q. What is the prognosis of somebody diagnosed with mesothelioma cancer?

A. It is considered universally lethal. There is no good treatment for malignant mesothelioma which is the cancer. Most people live about a year, year-and-a-half. A

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few people live a few years but most everybody dies from the disease unless they develop something else in the meantime.

Q. What are the symptoms of mesothelioma?

A. The presenting symptoms, meaning the initial thing that the patient feels, is chest pain which does not go away or shortness of breath which is severe and more or less sudden.

Q. What typically occurs next after those symptoms are presented and reported to a doctor?

A. Usually, the person sees a doctor pretty soon. These aren't symptoms that are mild and they wouldn't be ignored.

The person has a chest x-ray, a physical examination. The physical examination will usually show -- when they listen to the lungs with a stethoscope you will hear abnormal sounds.

The chest x-ray will show clear abnormality on one side or the other of the lungs. That abnormality, you can't tell exactly what it is from a chest x-ray. You can tell that it is significant. You can tell usually there is fluid in the lung which is produced by the mesothelioma, by the cancer, but it requires further testing to make a tissue diagnosis, to actually get tissue and look at it under the microscope and confirm that it is a mesothelioma as opposed to some other problem.

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Q. Is there any treatment for mesothelioma that is practiced?

A. There is no successful treatment in the sense of cure. Various agents, pharmacological agents, chemotherapy, are used. There are some protocols, some experiments with different agents to see what works. Some places do some surgery, but it is really aimed at prolonging life and improving the quality of life, if it does that, and not really a cure of the disease because there is no known cure.

Q. Is mesothelioma a painful disease?

A. Yes, it is. The hallmark of mesothelioma is chronic, persistent pain in the chest and severe shortness of breath and it is considered, even for a cancer, an especially wasting kind of cancer. The person loses a lot of weight and it is a dramatic kind of thing; more dramatic than most cancers.

Q. Have there been any case studies of workers that developed mesothelioma from asbestos exposure in the workplace?

A. Yes, many studies.

Q. What is the range of workplace exposure that is causally related to mesothelioma?

A. Most studies have not measured the amount of asbestos in the air. That typically wasn't done historically and we don't have good information about that.

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What we have are descriptions of how long people worked in a given trade and what kind of exposure they had.

Mesothelioma, of all the asbestos-related diseases, is considered the one which requires the least amount of exposure, such that a period of months or a few years would be sufficient to produce the mesothelioma or a relatively lower level of asbestos exposure would lead to this disease, say, compared to the scarring of asbestosis.

Q. Is there clinical evidence of workers developing mesothelioma from workplace exposure of under three years?

A. Yes.

Q. Doctor, is there a safe level of exposure to asbestos as far as mesothelioma is concerned?

A. There is no established safe level. We know mesothelioma occurs at relatively lower levels of asbestos exposure.

It hasn't been proven there is a level at which -- a defined level of asbestos exposure which is safe which means there is zero risk. It is thought generally there is a dose-response relationship; as the dose increases -- the exposure increase, there is an increased risk of mesothelioma, and as exposure decreases, there is a decreased risk but that -- if there is any exposure, there is some level of risk.

Q. Has there been any case studies of individuals

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who developed mesothelioma from non-work-related exposure to asbestos?

A. Yes. In fact, some of the earliest studies of mesothelioma related to non-occupational exposure. These were studies of people who lived near asbestos factories, never stepped inside the factory but lived in the neighborhood and, therefore, got asbestos exposure from the contamination of the neighborhood by the factory.

There have been mesotheliomas among family members of workers who have worked with asbestos. For instance, the insulators would -- typically, in the old days, meaning the '40s, '50s and '60s, and, to some extent, into the '70s, these insulators would wear their work clothes home. They would be dusty. That is the nature of their work.

The spouse would often shake out those clothes, thereby actually contaminating the home space with asbestos. At Mount Sinai and elsewhere we have been seeing some of the children of those homes and spouses who have developed mesothelioma, again, after the latency period, after 20 or 30 years.

We can identify that being due to asbestos because asbestos is the only known cause of mesothelioma. If we see a 32-year-old with mesothelioma, we know their exposure most likely occurred early in life.

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Some of those people we have seen are the children of the insulators. Clearly that is a lower level exposure than you would expect in the workplace where asbestos is directly used.

Q. Can asbestos cause lung cancer as well?

A. Yes.

Q. What type of lung cancer can it cause?

A. Pretty much all types of lung cancer.

Q. Is it a type of lung cancer that is treatable at all?

A. Well, of the major types of lung cancer, certainly attempt is made to treat the cancer. There is a better prognosis with mesothelioma but lung cancer is still largely an uncurable disease.

One cell type in particular is somewhat amenable to chemotherapy. If the cancer is early, detected when it is small, then it can be removed and the person can lead a normal life thereafter. But, unfortunately, that is the minority of cases.

Q. Referring briefly to the model of the lung, would you just show us where the lung cancer develops that is caused by asbestos?

A. Again, showing the inside of the lung here, the air travels down through the trachea, the windpipe, and here it breaks into smaller -- a system of tubes which carries

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the air into the lung tissue itself which is the pinker area. It is this pinker area of the lung tissue, the parenchyma, that is where the lung does its work of exchanging gases, bringing in oxygen and removing carbon dioxide.

The lung cancer can occur in the lung tissue itself, the parenchyma, or it can occur affecting the major conducting tissues as well. That is inside the lung.

All of that is considered lung cancer as opposed to outside of the lung, the pleura, which would be a mesothelioma. Both cancers relate to asbestos.

Q. What is the prognosis for the lung cancer caused by asbestos exposure?

A. Well, most lung cancers are not fully amenable to treatment. It is the number one cancer in the U.S. currently. It is really the minority of lung cancers, whether due to asbestos or smoking or anything else, that are amenable to a cure.

Q. As far as developing lung cancer is concerned, Doctor, how does the risk factor of someone who has not been occupationally exposed to asbestos compare to the risk of someone who has been occupationally exposed to asbestos?

A. Asbestos exposure increases the risk of lung cancer and it -- depending on the study, it is anywhere from a two-fold increase to a five-fold increase or even higher.

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Q. Does cigarette smoking also cause lung cancer?

A. Yes, it does.

Q. Have there been any studies on the effect of smoking and asbestos exposure on the development of lung cancer?

A. Yes.

Q. What is the increased risk from asbestos exposure as opposed to increased risk from cigarette smoking as far as lung cancer is concerned?

A. Well, both agents, whether it is cigarette smoking or asbestos, independently increase the risk of lung cancer.

The largest study most frequently quoted is that by Dr. Selikoff of Mount Sinai of the insulators who were heavily exposed to asbestos. Among the insulators who didn't smoke regularly they had a five-fold increased risk of lung cancer due to the asbestos. That increased risk was due to asbestos and not to cigarette smoking.

If you look at a larger study of people who were not exposed to asbestos but smoked heavily, they would have a ten-fold increased risk of lung cancer.

So, separately, each, smoking and asbestos, have caused an increased risk of lung cancer. If you put them together you get a 50-fold increase in lung cancer. The two multiply to get a 50-fold increase in risk.

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Clearly, the two work together synergistically to produce a very high risk of lung cancer even though

each exposure by itself increases the risk of lung cancer quite significantly.

Q. Doctor, what is asbestosis?

A. Asbestosis is the scarring of the lung produced by asbestos.

Q. Briefly, would you describe the physical process that results in the asbestosis, and if you need to refer to the model, please do so?

A. The asbestos fibers in the breathing space, in the work environment, once they become airborne, if a person isn't wear a mask, are readily inhaled to the lung.

As I said before, some of them, particularly the clumps or larger fibers, may get caught up in some of the body's defense mechanism, the hair or nose or mucous, or there are tiny little hairs lining the windpipe called cilia that try to remove foreign material from the lung.

A lot of fibers, because they are small and because of what I mentioned before, the aerodynamic quality of moving sideways, are swept into the lung by breathing, and reach the conducting tubes where they might settle in the walls of the conducting tubes but also get to the outer reaches of the lung itself, into the lung parenchyma where the gas exchanges occur.

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Many of them stay there for the rest of the person's life. There is no known way of getting rid of the fibers once they are inhaled.

At some point those fibers in some individuals can provoke scarring. This is the same kind of scarring that you see on the skin. It is dead tissue. It is, collagen and it collects in the lungs, more at the bases than the upper parts of the lungs.

If there is a little bit of scarring then it won't affect the person in terms of symptoms or their breathing ability but if there is a fair amount of scarring then they will get some symptoms and reduction in their pulmonary function.

Q. What are the symptoms of asbestosis?

A. Shortness of breath is the cardinal symptom. A person finds it hard to breath and they have to breathe more frequently than they would given the same tasks.

Q. How does one go about clinically diagnosing asbestosis?

A. We use the routine tools. The physical examination will often show the characteristic findings when you listen to the lungs with the stethoscope. More sensitive is the routine chest x-ray. It needs to be viewed by a person with training in occupational diseases. Routine chest x-ray will often show the scarring at the bases of the

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lungs.

Q. Is there any treatment for asbestosis?

A. No. There is no -- nothing.we can do to retard or reverse the scarring. We advise influenza shots, pneumonia vaccinations to try to prevent some of the complications of asbestosis. We can give advice about further exposure but the disease process itself, there is nothing we can do about it.

Q. Is that a painful disease?

A. Well, it -- pain is not the hallmark of asbestosis. The suffering relates to the shortness of breath and the inability to do normal things.

Q. Does it have any effect on the patient's weight, appetite or appearance?

A. In advanced disease the person can have weight loss and have the appearance of anyone with a chronic lung disease.

Q. Is asbestosis a fatal disease?

A. It can be fatal but it is usually not. Among the insulators, about 10 percent developed fatal asbestosis, very advanced scarring where they died from pneumonia or some complication. Usually it doesn't cause death but may cause significant hardship.

Q. What is the latency period for asbestosis?

A. Here, again, we are talking about the gap in time

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between when the person is first exposed and when they develop clinical symptoms, they feel short of breath or we can pick the up on the x-ray and this time the latency period is shorter; it is usually 15 or 20 years at a minimum. It may occur earlier but usually not; 15, 20, 25 years is when we begin to see it usually. The risk increases with time. As you stretch that latency period you find increased risk of asbestosis.

Q. How does the amount of exposure required to induce asbestosis compare to the amount of exposure required to produce mesothelioma?

A. Generally, it is considered that lower levels of exposure are needed for mesothelioma than to produce asbestosis.

Q. Does cigarette smoking cause asbestosis?

A. No, it doesn't.

Q. Is it necessary to have asbestosis in order to develop mesothelioma?

A. No, it is not. One is scarring and the other is cancer. In fact, they are different tissues.

The asbestosis is scarring of the lung tissue. The mesothelioma is cancer in the pleura, the covering tissue outside the lung.

Q. They are in different locations?

A. That's correct.

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Q. Is there an established threshold of exposure for asbestos-related cancers?

A. No.

Q. Does it ever occur that people with mesothelioma do not have asbestosis?

A. Yes. In fact, just to elaborate a little bit, there is scarring of the pleura that occurs that I don't call asbestosis per se, I call it pleura scarring. The person can have a mesothelioma without seeing the scarring of the pleura due to the asbestos.

Q. Are asbestos-related diseases preventable?

A. Yes.

Q. How are asbestos diseases preventable?

A. Reduce or eliminate exposure to asbestos.

Q. Is the plaintiff in this case, Michael Buckley, a patient at Mount Sinai Environmental and Occupational Medicine Clinic?

A. Yes.

Q. Do you know when he was first examined at the Mount Sinai clinic?

A. In 1990.

Q. Do you recall --

A. January 23, 1990.

Q. Who examined him at that time?

A. Dr. Robin Herbert.

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Q. Did she write a report regarding Michael Buckley?

A. Yes.

Q. Have you read that report?

A. Yes.

Q. Is she a colleague of yours?

A. Yes.

Q. Is that a report of the type reasonably relied on by experts in your field?

A. Yes.

Q. Have you so relied on it?

A. Her report?

Q. Yes.

A. I have looked at it but I got my information directly from the patient.

Q. When did you examine the plaintiff, Michael Buckley, at the Mount Sinai clinic?

A. February 4, 1994.

Q. At that time did you interview Mr. Buckley?

A. Yes, I did.

Q. For how long a period of time did you interview Mr. Buckley, if you can recall?

A. I probably, all told, probably spent an hour-and-a-half with him.

Q. Did you take a medical and occupational history of Mr. Buckley at that time?

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A. Yes, I did.

Q. Can you tell us what medical history you obtained from Mr. Buckley?

A. He had no chronic medical problems that required ongoing medical attention. He had never been hospitalized or had any surgery. He took no medications at the time. In fact, he had no history of any medical problems.

Q. Did you take an occupational or work history from Mr. Buckley?

A. Yes.

Q. Would you tell us what occupational history you obtained?

A. Sure. He graduated from high school in 1972 at age 17. For the next one to two years he had various odd jobs but none involved any exposure to asbestos or toxins.

Beginning at age 19 he worked for the railroad; it wasn't Metro-North but for the predecessors of Metro-North.

From age 19 to the time I saw when him he was 39 he worked continuously for the railroad.

For the first two years at Metro-North's predecessor he worked as a carpenter assigned to a station in Stamford, Connecticut where he was mostly replacing or installing windows. He had done some cutting of railroad ties as well outdoors. He recalled -- he had no exposure to

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insulation material that he recalled when he saw me.

From age 22 to 27 his job title at Metro-North was plumber. He said most of his work involved repair of bathrooms, installing water lines, hot water heaters and the like, and most of this work didn't involve any significant exposure to any insulation material whether it contained asbestos or not.

From age 27 to age 30 he was a locomotive electrician for Metro-North. This involved inspection of locomotives and brakes. He was not directly involved with repair of those brakes. Again, he recalls no specific contact with asbestos during that time period

From age 30 to the time that I saw him, which was about a year ago, he was in the job title of plumber or pipefitter at Metro-North. This was beginning in 1985.

He was assigned to the Grand Central Terminal where he worked mainly around water, the steam mains, pipes, which ranged in sizes from half-inch pipes to 20-inch pipes that carried water and steam to heat Grand Central and the power in the neighboring buildings.

At that point Grand Central or Metro-North was undergoing significant renovation, a capital program to overhaul the pipes and the network related to steam transport.

He was involved with replacing valves and pipes.

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He would be asked to go in and actually replace whole sections of the pipe in the tunnels.

This work involved much -- most of this pipe was surrounded by insulation material. It is there to keep the steam and heat in, particularly the heat in.

He had to remove the asbestos material from the pipes prior to either performing the repair or replacing

the pipe or valve. He told me specifically he did this by hand. He had various tools like a hammer, ax or wire cutters and he would rip the asbestos containing insulation off the pipe. This produced a great deal of dust. Some of it was in asbestos brick form but most of it was asbestos plaster-like material adherent to the pipes and valves. He said it produced a great deal of dust.

He also had to clean up the debris that he created before he would actually do the job. All of this was in the dry asbestos state. It wasn't wet down which would reduce dust levels. He said that he -- excuse me.

He said that he would be covered head to toe with a white dusty material from the insulation material. He and his co-workers apparently labeled themselves as snowmen because this was their appearance after doing this kind of work. He would stay in that area -- this would take about one to two hours per day on average, sometimes it was an hour, sometimes it was three or four hours a day, this kind

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of asbestos rip out and sweeping up the debris and then do the other part of his job which was the repair or replacement.

He would be working in this dirty field throughout the day because the asbestos remained in the area even after being swept up and removed.

He described being able to taste insulation material at the end of the day and it would get into his nose and

ears. He wasn't provided with a mask and took no precautions and wasn't aware that this was hazardous work. This occurred from 1985 to early 1988 at which point he was taken off of the asbestos removal. It was farmed out to a company which specialized in asbestos removal and, therefore, he returned to his job as plumber pipefitter.

He received some training and a respirator and went back to doing his repairs, replacement, but not specifically the removal of the asbestos.

Q. Doctor, did you conduct an examination of Michael Buckley at the time?

A. Yes, I did.

Q. What did the examination consist of?

A. It was a standard physical examination. I really concentrated on the areas that I would expect to be related to asbestos meaning the appearance of the fingers, the mouth and the lungs. It was normal. He was fine.

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Q. Did you order any tests?

A. Yes. I ordered spirometry which is breathing tests and a chest x-ray.

Q. Was there anything unexpected about the findings of those tests?

A. No. The breathing was normal and the x-ray was normal.

Q. Were those the standard tests that are given for patients with a history of asbestos exposure?

A. Yes.

Q. Doctor, are you familiar with the various types of asbestos that are in the workplace?

A. Yes.

Q. What are the various types of asbestos in the workplace?

A. Chrysotile is the major one that has been used in insulation material in this country. Other types include amosite, crocidolite, anthophylite. These are the major types.

Q. Do all types of asbestos cause disease in humans?

A. Yes.

Q. Doctor, did you review any documents concerning the presence of asbestos in Grand Central Terminal?

A. Yes, I did.

Q. Would you just refer to the titles of those

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documents; for example, Doctor, what has been marked as Exhibit 2403 in this trial is the report of

the Metro-North asbestos consultant by the name of Environmental Health Protection Consultants?

A. Right. I don't have it up here.

MR. LANDMAN: Your Honor, may we approach, please?

THE COURT: Yes.

(Continued on next page)

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(In the robing room)

MR. LANDMAN: We have a report that was turned over in this case with respect to what Dr. Markowitz would testify about.

Based upon that report we didn't take his deposition because it was basically that plaintiff is fine and that is the end of the story.

He did an exam and he says he has an increased risk because of this asbestos exposure and talks about what history he got. There is nothing in this report that says anything about -- that Dr. Markowitz was going to review or had reviewed any records from Grand Central, that he had ever gone there or was going to offer any opinion whatsoever about the asbestos at Grand Central. Their next witness is going to

do that. But I think it is very unfair at this stage to have a trial by ambush since we were not disclosed any of this information. We are getting into an area that wasn't disclosed. Here is the report.

MR. GOETSCH: Your Honor, I was simply asking him whether he had reviewed documents.

THE COURT: That wasn't suggested in the report?

MR. GOETSCH: It was not stated in his report.

THE COURT: Was it suggested in his report?

MR. GOETSCH: No, it wasn't.

THE COURT: Was it suggested? Would anyone

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reading that report have assumed that this question might be asked?

MR. GOETSCH: Well, he gave the opinion that there was asbestos.

THE COURT: Would you answer my question? Would anyone reading this report get the impression that this question was going to be asked?

MR. GOETSCH: Not directly, your Honor.

THE COURT: Then it is excluded.

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(In open court)

THE COURT: You may proceed.

BY MR. GOETSCH:

Q. Doctor, based on Mr. Buckley's physical examination, his medical history and occupational history that you took from him, do you have an opinion as to whether he was exposed to a significant amount of asbestos while working at Grand Central Terminal from June of 1985 to June of 1988?

MR. LANDMAN: Objection; calls for complete speculation.

THE COURT: You can cross-examine him.

THE WITNESS: Yes. I believe he did have a significant amount of exposure to asbestos on a daily basis for two-and-a-half years.

Q. Do you have an opinion as to whether Mr. Buckley has inhaled or ingested into his lungs a harmful amount of asbestos fibers?

A. I believe he has.

Q. Doctor, is it more likely than not that Mr. Buckley's inhalation or ingestion of those asbestos fibers into his lungs has initiated any biological changes in his lungs?

A. I believe that it is likely that it has -- he has had some reaction.

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THE COURT: You have -- we lawyers like to use big words. Do you have an opinion with a reasonable amount of medical certainty that this --

THE WITNESS: I think it is more likely --

THE COURT: That is the not question; with a reasonable amount of medical certainty that it has happened.

THE WITNESS: I think there is a reasonable --

THE COURT: Yes or no?

THE WITNESS: Yes.

Q. Would you explain the basis of your opinion, Doctor?

A. The inhalation of asbestos fibers into the lungs -- the fibers reside in the lungs. We don't see disease that we can detect for usually 15 or 20 years.

Presumably there is a tissue reaction to those fibers in the lungs once they are inhaled. Now, the exact timing and nature of those findings in that window of time is not exactly known. We don't biopsy, take pieces of lung, from people exposed to asbestos who are perfectly healthy, say one or two or three years after they were first exposed.

We do, however, have animal experiments in which animals are either given asbestos usually through inhalation or it is put directly into the trachea and those animal studies do show biological changes within a matter of days after exposure to asbestos.

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Q. What type of biological changes are shown?

A. Well, the defense system of the body is activated. There are cells called macrophages which are in the lungs normally. Those attempt to ingest and detoxify the asbestos fibers.

It is thought that once those -- it is documented through animal studies that once those macrophages become activated that they give off certain enzymes which cause other tissue reactions, that they produce active oxygen species which cause, again, tissue reactions or some damage locally and other kinds of reactions locally.

The macrophage seems to be the center of the most activity within the lung parenchyma. There are other cells that line the alveoli that appear to become involved. Fibroblasts are cells that create fiber or scars.

We have fibroblasts throughout our body. They are useful because scars are useful in terms of wound repair. They produce the scars in the interstitial, in the space between the sacs where air exchange occurs. These are some of the changes that occur.

THE COURT: Incidentally, the witness doesn't know our tribal customs and you shouldn't hold it against him. We don't hold it against the witness if he doesn't know our tribal customs.

Q. Doctor, do you have an opinion to a reasonable

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degree of medical certainty as to whether Michael Buckley has a significant risk of developing asbestos-related diseases as a result of his exposure as a Metro-North pipefitter in Grand Central Terminal from June of 1985 to June of 1988?

MR. LANDMAN: Objection. May we approach on this?

THE COURT: Yes, certainly.

(In the robing room)

MR. LANDMAN: The issue in this case is whether or not it is more likely than not that the plaintiff will suffer in the future an asbestos-related disease.

The question that has now been asked is whether or not there is a significant risk which doesn't answer the question. It isn't helpful to the jury deciding this case or for the court in deciding whether this should go to the jury.

The question is within a reasonable degree of medical certainty does Mr.

Buckley have a reasonable -- is it more likely than not that he will develop a asbestos-related disease.

THE COURT: I don't see what that has to do with this case.

MR. LANDMAN: It doesn't, but it goes to the reasonableness. I don't see that any of this has to do with

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the case. They haven't shown a severe emotional injury. They don't have a psychiatrist or any evidence. That is a separate issue. But to ask does he have a significant risk is not advancing this case at all.

MR. GOETSCH: It is his fear of developing.

THE COURT: His fear but whether it is a reasonable fear, I don't know if that is even --

MR. GOETSCH: That is exactly what I am getting at.

THE COURT: I don't think that is reasonable. Does he have a fear?

MR. GOETSCH: Yes, but the doctor -- he has to have a medical basis for having a fear, your Honor.

THE COURT: He doesn't have to have a medical basis for having a fear. Why he was

told all of this, I don't know. That gave him the fear. Why he was told all of this except for this lawsuit, I can't imagine. I can't imagine a doctor scaring the hell out of a patient just for the hell of it.

MR. GOETSCH: The issue that the plaintiff has to prove is whether he has a reasonable belief, a reasonable foundation to believe and to be --

THE COURT: I don't see why they have to prove that. If they scared the held out of him --

MR. LANDMAN: It is a two-part test. One part is

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his fear. Does he have a severe emotional injury; that is the first question.

The second question is even if he does, which I don't think there is any evidence of, but even if he does, is it based upon a reasonable probability that he is going to develop this disease; otherwise, we are just in a complete world of speculation.

THE COURT: That is true. What question --

MR. LANDMAN: I think the question should be, is it, based upon a reasonable degree of medical certainty, is it more likely

than not that Mr. Buckley will develop an asbestos-related disease in the future.

MR. GOETSCH: I think the question really is, what is his risk of developing asbestos-related disease in the future.

THE COURT: That is the question he is asking. Then you can ask him the percentage.

MR. LANDMAN: But not the question that was asked which is does he have a significant risk because that doesn't mean anything, significant. To.some people one percent is significant, to other people it would have to be more than that.

MR. GOETSCH: I can ask him if he has a risk of developing asbestos-related disease. You are just objecting --

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MR. LANDMAN: To the word "significant."

MR. GOETSCH: Dr. Nicholson is the risk assessor and he will quantify it.

MR. LANDMAN: All you are going to ask him is does he have a risk.

MR. GOETSCH: I will not ask him to say 1 percent, 50 years, without him saying what the percentage is, it doesn't seem probative.

THE COURT: We all have a risk. There is a risk of my getting --

MR. LANDMAN: Every one of us.

MR. GOETSCH: That is why I asked, is there a significant risk.

THE COURT: What does "significant" mean? I think he has to quantify it to make it meaningful. Significant may mean one thing to you, another thing to me. If he can't quantify it, then don't ask him.

MR. GOETSCH: I can ask him whether he has a risk and then --

THE COURT: No, you can't.

MR. GOETSCH: First I have to ask him if he has a risk and then ask him what is the amount of risk that he has.

THE COURT: All right.

MR. LANDMAN: Yes.

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THE COURT: Can you say with a reasonable degree of medical certainty what the amount of the risk is.

MR. LANDMAN: Exactly.

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(In open court)

BY MR. GOETSCH:

Q. Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Michael Buckley has a risk of developing asbestos-related diseases as a result of his employment as a Metro-North pipefitter at Grand Central from June of 1985 to June of 1988?

A. Yes, he certainly has a risk of asbestos-related diseases from that exposure.

Q. Doctor, will you quantify to us to a reasonable degree of medical certainty the amount of that exposure that Mr. Buckley has incurred?

A. The amount of the exposure?

Q. The amount of the risk that Mr. Buckley has incurred.

A. I don't engage in quantitative analyses about this. I believe the risk is significant.

MR. LANDMAN: Objection.

THE COURT: Significant is a word that doesn't mean anything to us.

THE WITNESS: I think that, Judge, based on similar patients I have seen or patients I have

seen in similar kinds of exposure settings, I think that --

MR. LANDMAN: Objection. I don't think we are getting into a reasonable degree of medical certainty here.

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MR. GOETSCH: He is answering the question. He is quantifying the amount.

THE COURT: See if you can quantify the amount. Does he have a 50 percent risk?

THE WITNESS: No. I would say it is 1 or 2 or 3 percent risk of all of the diseases that he wouldn't have had had he not been exposed to the asbestos. It is in that range. It is not zero. It is not 10 percent.

Q. Does that amount of increased risk include mesothelioma cancer?

A. Yes.

Q. Does it include lung cancer?

A. Yes.

Q. Does it include scarring of the lungs?

A. Yes. Actually, I think it is quite likely that he will get some scarring of the pleura, and I wouldn't say

that is 1 or 2 or 3 percent. I would say that is probably, I would guess, 10 percent.

Again, given two-and-a-half years of daily exposure, I would say under those circumstances a minimum of 1 out of every 10 people would develop scarring of the pleura; not necessarily the lungs themselves also but of the pleura.

Q. How does the amount of increased risk of mesothelioma compare to the amount of lung cancer?

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A. Lung cancer risk relates to, not just to the asbestos but to the cigarette smoking, and he has a history of cigarette smoking although he has stopped.

I would say that his risk of mesothelioma is somewhat higher than his risk -- the excess risk of lung cancer from asbestos. That assumes that he continues to stop smoking cigarettes or essentially stops smoking cigarettes.

Q. Is mesothelioma cancer caused by smoking cigarettes?

A. No, it is not. When I talked about smoking cigarettes, I was talking about lung cancer, not mesothelioma.

Q. Is his increased risk of mesothelioma affected by his smoking cigarettes?

A. No. Mesothelioma has nothing to do with smoking cigarettes.

Q. Did he have a history of smoking cigarettes?

A. Yes.

Q. What was his history?

A. He smoked from 17 to 37, less than a pack a day on average.

Q. Was he given any advice about smoking cigarettes at the Mount Sinai clinic?

A. Yes.

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Q. What was he advised?

A. I advised him to not take up cigarette smoking again. He had been off cigarettes for a couple of years by the time I saw him.

Q. Is cigarette smoking addictive, Doctor?

A. Yes.

Q. What happens to the risk of developing cigarette smoking disease when a smoker reduces his smoking to less than one cigarette a day?

A. The risk of any of the cigarette smoke-related diseases decreases with time, as soon as you stop smoking.

It takes quite a while -- it takes years before it disappears or gets down to background level, but it does

begin to decrease when you stop. That is true of lung cancer and well as emphysema.

Certainly, the progression of the emphysema is not as bad as if the cigarette smoking were continuing.

Q. When the amount of smoking is less than one cigarette per day how much risk of cigarette-smoking disease does that present?

A. Then it is based on what the history was. In other words, if he smoked for 20 years less than a pack a day, that becomes determinative of his smoking risk in the future.

Once he stopped, then he doesn't -- he gets no

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extra risk from the cigarette smoking because he stopped, less than one a day -- one cigarette a day, right?

Q. On average, less than one cigarette a day.

A. Right. That is essentially equivalent to stopping.

Q. Is it your understanding, Dr. Markowitz, that currently Mr. Buckley has reduced his smoking to less than one cigarette a day?

MR. LANDMAN: Objection. Where is the foundation for that?

THE COURT: Sustained.

Q. Doctor, from your point of view as a medical doctor, has Mr. Buckley taken reasonable steps to reduce his risk of developing cigarette-smoking disease?

A. Yes. He stopped smoking cigarettes two years before I saw him.

Q. As far as smoking less than one cigarette a day on average, is that the equivalent of stopping smoking?

A. That is what I mean. If a person smokes a cigarette now and then, I advise him not to, but it doesn't add up to much risk. To go from less than a pack a day to sneaking a cigarette now and then is a significant change.

Q. Doctor, what effect does smoking less than one cigarette a day have on Mr. Buckley's increased risk of developing asbestos-related lung cancer?

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A. Could you repeat the question?

Q. What effect does smoking less than one cigarette a day have on Mr. Buckley's increased risk of developing asbestos-related lung cancer?

MR. LANDMAN: Objection, since the question leaves out the 20 years of smoking history that he had before that so it assumes facts not in evidence.

MR. GOETSCH: I asked him about Mr. Buckley and Mr. Buckley had a previous history of smoking and I asked what effect hav-

ing less than one cigarette a day would have on Mr. Buckley's --

THE COURT: Technically, that is improper because there is no evidence that he is smoking less than one a day, however, I will let you assume he is smoking less than one a day and if it turns out on the evidence that he isn't, you can disregard the answer.

MR. GOETSCH: Thank you, your Honor.

THE WITNESS: Could you repeat the question?

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Q. Taking Mr. Buckley, what effect does smoking less than one cigarette a day have on his increased risk of developing asbestos-related lung cancer?

A. One cigarette a day or less than one cigarette a day does not meaningfully increase his risk. His cigarette smoking-related risk is determined by the 20 years that he smoked at close to a pack a day. It is not determined by ongoing exposure of one or less cigarettes per day. It is just not meaningful, that kind of continued exposure.

Q. Doctor, what is the total cost of Mr. Buckley's asbestos tests and examination conducted at Mount Sinai up to the present?

MR. LANDMAN: Objection. For the purpose of this lawsuit, why is it relevant?

THE COURT: Let me have the question read, please.

(Question read)

THE COURT: I don't see what is wrong with that.

MR. LANDMAN: You know what, your Honor? I will withdraw my objection. That is fine.

MR. GOETSCH: Thank you.

A. It is, oh, $1,080. That is for two examinations, 1990, 1994, including chest x-ray and the breathing tests.

Q. Dr. Markowitz, have you advised Mr. Buckley to undergo periodic medical surveillance in the future?

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A. Yes.

Q. Do you have an opinion to a reasonable degree of medical certainty as to whether he will incur any future medical expenses as a result of undergoing such periodic medical surveillance in the future?

A. Yes. Assuming that he undergoes a periodic checkup for asbestos-related disease, he will incur some expense.

Q. What is the medical test and examination that you recommend Mr. Buckley should undergo in the future for his medical monitoring?

A. Annually, he should have a medical exam, and physician counseling, basically, pulmonary pump testing, chest x-ray. At some point the chest x-ray could go every other year instead of every year but for the time being it should be a year. Than he should have signoidoscopy, which looks at the large intestine in the colon to test for colon cancer. That need be on a two-year basis at beginning age 45. He also needs a test of stool for blood, which is a minor test.

Q. Doctor, what is the reasonable annualized cost in today's dollars for such periodic examination and tests?

A. Well, annualized --

THE COURT: What is the basis of his expertise as to what other doctors charge?

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MR. GOETSCH: We are talking about the charges at the Mount Sinai Clinic, your Honor.

A. Taking the sigmoidoscopy, which is expensive, about $600, and dividing it in 2, because it is only once every other year and not every year, the annual charge would be about $950, somewhere in that range, $900, $950.

Q. And that is taking all the tests over a two year period and averaging the cost over each two-year period?

A. Per year, right.

Q. Do you have an opinion as to whether Michael Buckley should continue to undergo such medical monitoring for the remainder of his life?

A. Yes. He began exposure at age 30, and his period of risk will peak for the cancers at age 50, 60, 65. So certainly he needs to continue testing for the foreseeable future.

Q. Doctor, does Michael Buckley have, in your opinion as a medical doctor, a reasonable medical basis to fear that he will develop asbestos-related disease in the future?

MR. LANDMAN: Objection. He has already testified about what the increased risk is.

THE COURT: Objection sustained.

Q: Doctor, assuming that Mr. Buckley had the statistical future life expectancy of 36.5 years, is it your

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opinion that he will have to undergo this medical monitoring for the rest of his statistical life?

A. Yes. In particular, we expect improvements in medical monitoring in the coming years, not to mention decades, so that it will be even more useful in the future.

MR. GOETSCH: Thank you. No more questions at this time.

THE COURT: Are you ready to start?

MR. LANDMAN: I can. I don't know if the jury needs a break, five minutes or whatever. It is up to your Honor. I can start now.

THE COURT: You can?

MR. LANDMAN: Yes.

THE COURT: Do you need a break? OK, start.

CROSS-EXAMINATION

BY MR. LANDMAN:

Q. Doctor, this isn't your first asbestos case you have testified in, is it?

A. No, it is not.

Q. How many cases have you reviewed that were sent to you by lawyers?

A. Individuals, over a hundred, but I don't know beyond that.

Q. And 25 percent of your income, doesn't it, Doctor, comes from asbestos litigation?

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A. That was true of '93. I don't know about '94. It wouldn't be any more than that in '94. I think it might be less.

Q. How many times did you testify in 1994?

A. I believe it was three times.

Q. With respect to generally how many hours you spent preparing to testify, in this case you first were sent Mr. Buckley and examined him; is that right?

A. That's right.

Q. And you wrote a report?

A. Yes.

Q. What did you charge for all of that?

A. I believe it was $175.

Q. That was for examining him?

A. And the report.

Q. So that wasn't $300 an hour?

A. That's correct.

Q. Do you charge $300 an hour when you are testifying?

A. Actually, usually, when I examine the patient, but I notice in going over the bills he was billed at $175 for a new visit. The report wasn't --

Q. That was a mistake?

A. It was whatever it was. I don't know what it was.

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Q. Usually you charge more than that, is that right?

A. $300 an hour.

Q. What is the last time you testified in an asbestos case?

A. I believe it was June of '94. It was sometime in '94.

Q. And when is the next time you are going to?

A. I have no idea. There is nothing on the calendar.

Q: You end up testifying in about half the cases you review, isn't that right?

A. That sounds about right.

Q. Have you ever testified, Dr. Markowitz, in a case before this one where the person had absolutely no asbestos-related disease, in an asbestos case?

A. No clinically recognizable disease? No.

Q. So this is unique for you?

A. That's correct.

Q. And you reviewed, as of 1993, which is a year and two months ago, over a hundred cases, isn't that right, that were sent to you by lawyers?

A. Yes. It sounds right.

Q. How many were sent to you in 1994?

A. Ten, I would guess. I don't keep the numbers.

Q. How many have been sent to you so far this year?

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A. None.

Q. You have never actually reviewed cases that were sent to you by defendant in a lawsuit because no defendant ever sent you a case, isn't that right?

A. Not in asbestos. I have a different hazardous-waste exposure but not asbestos.

Q. What kind of injury is alleged in that case, the hazardous waste case?

A. Some neurologic syndrome.

Q. Neurologic?

A. Correct.

Q. So you have gone out and solicited work from plaintiff lawyers but not from defense lawyers, isn't that right, with respect to asbestos litigation?

A. I wouldn't use the word "solicited."

Q. What word would you use?

A. I wrote a letter in 1988, when I began to do this, saying that I was aware of the need and that I was available to review cases, examine people, and write reports, and testify.

Q. That there was a need for what?

A. There that there was a need for an expert witness, an expert judgment about whether someone had an asbestos-related disease and a willingness to appear in court.

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Q. The law firms that you wrote were three of the firms in the United States that represent employees that are suing about asbestos injuries, isn't that right?

A. That's correct.

Q. And one was in South Carolina?

A. Correct.

Q. One was in Washington, D.C. and one was here in New York City, isn't that right?

A. Correct.

Q. In fact, the one you wrote in New York City sent you about half the work you get, isn't that right?

A. In the ensuing years, that's true.

Q. Who is Dr. Stephen Levin?

A. He is a colleague at Mount Sinai.

Q. What does he do?

A. He is director of our occupational health clinical center.

Q. Do you work for him?

A. No.

Q. Did you in 1988?

A. No.

Q. So he is the director of this whole occupational clinic?

A. He is the director of the clinic, not of the division.

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Q. And he is the one who told you, "Dr. Markowitz, why don't you get in on this, why don't you write some letters to these lawyers and they will use you to testify"?

A. Well, it didn't exactly go like that.

Q. How did it go?

A. He and others had made me aware for a number of months before this that there was a need for people who would review cases, examine people and appear in court. I wasn't interested for a while. Then after a period of time I decided I had the relevant expertise, and I think I asked him how to get involved, and he may have said -- I think he probably said, "Why don't you just write a letter to certain law firms."

Q. And from that you have now made 25 percent of your income?

A. Well, that was true in 1993. That wasn't necessarily true before that or since that time.

Q. I would like to show you what has been marked as Defendant's Exhibit A. If you could, Dr. Markowitz, could you just tell me, are those three letters dated February 17, 1988, the letters you wrote with respect to this?

A. Yes. The same letter.

Q. They were written on Mount Sinai stationery, isn't that correct?

A. That's correct.

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MR. LANDMAN: I would offer these in evidence, your Honor.

THE COURT: Any objection?

MR. GOETSCH: No objection.

THE COURT: Received.

(Defendant's Exhibit A was received in evidence.)

Q. Dr. Selikoff, whom you talked about a little bit this morning, never testified in an asbestos case, did he?

A. Not that I know of.

Q. Do you know Dr. Nicholson?

A. Yes.

Q. Who is he?

A. He is also a colleague at Mount Sinai, in the Division of Environmental and Occupational Medicine.

Q. Who got you in on this case? Did he get you in or did you get him in?

A. I think it was neither.

Q. Did you at some point in time learn that Dr. Nicholson was also going to be an expert in this case?

A. That's true.

Q. When did you learn that?

A. I don't recall. It was sometime after I was asked whether I wanted to see one or more patients from this group. But it was sometime after that, I don't recall when.

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Q. And Dr. Nicholson came and sat in on the exam you did of Mr. Buckley, is that correct?

A. That's correct.

Q. How often do you and Dr. Nicholson work together?

A. We work together on -- he helped me with the study of bladder cancer in northern New York, but specifically, beyond that, I don't think we have worked together in terms of research.

Q. In the bladder cancer, that was also in connection with litigation with respect to a chemical plant, is that right?

A. No, it wasn't.

Q. What were you studying?

A. There is a chemical factory in Niagara Falls that used orthotoloudine which was known as the cause of bladder cancer in animals, and I went up there actually to educate people, and I found seven cases of bladder cancer among the work force and subsequently worked with NIOSH to document the outbreak of bladder cancer.

Q. Who paid you for that?

A. I wasn't paid for that.

Q. You weren't paid for that work?

A. No.

Q. Who paid Mount Sinai?

A. This was '89? I was mostly covered under

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educational grants to teach.

Q. You only see patients about 10 percent of your professional time, is that right?

A. That's right.

Q. About half a day a week?

A. Correct.

Q. And you see patients with repetitive motion injuries?

A. That's correct.

Q. Such as keyboard operators and things like that?

A. That's correct.

Q. Have you been asked to testify in some of those cases?

A. I was deposed in one case.

Q. You also see people who claim exposure, you said, to chemicals, is that correct?

A. That's correct.

Q. And pesticides?

A. That's correct.

Q. And carbon dioxide solvents?

A. Correct.

Q. And lead poisoning?

A. That's right.

Q. Mercury?

A. Correct.

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Q. Arsenic?

A. Occasionally.

Q. Cadmium?

THE COURT: Arsenic? What about old lace?

Q. Old lace?

A. No. No such luck.

Q. Cadmium?

A. Rarely, but. I think I have seen it.

Q. And also people claim about asthma?

A. Correct.

Q. Through work exposure?

A. Correct.

Q. And also occupational dermatitis?

A. Occasionally.

Q. That is skin rashes and things, isn't that right?

A. That's right.

Q. And obviously these exposure don't always affect the lungs, isn't that right?

A. That's correct.

Q. A number of them affect the brain or the neurological system?

A. That's correct.

Q. And some, as you said, affect the skin and some affect the musculoskeleton, the bones, isn't that right?

A. That's right.

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Q. And for solvents, for example, the exposure affects, you claim, the neurological system, the nerves?

A. It can.

Q. You are not a lung doctor, are you?

A. Excuse me?

Q. You are not a lung doctor, you are not a pulmonologist?

A. That's correct.

Q. What is a pulmonologist? Why don't you tell the jury.

A. A physician trains for three years of internal medicine and then an additional two years in pulmonary medicine, and then they take the board examination in pulmonary medicine and become a board-certified pulmonary specialist.

THE COURT: Pulmonary meaning lung?

THE WITNESS: Lung, that's correct.

Q. You don't treat people for lung cancer, right?

A. That's correct.

Q. If people have lung cancer, you would send them to a pulmonologist?

A. No, I would send them -- well, it depends. Either a lung doctor or a cancer doctor, an oncologist.

Q. Doctor, you referred, I believe, to some animal studies that you participated in that, you say, show some

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tissue reaction when the animals are given asbestos. Is that right?

A. I have not participated in those, but I read about them.

Q. Can you give me the names of those studies and where they are published?

A. Not specifically here, but I can provide them afterwards if you like.

Q. Why don't you bring those in tomorrow when you come in, the ones that support your position that if you give animals asbestos, they develop changes right away.

A. Sure, if you want.

Q. How much asbestos was given to those animals?

A. I don't recall. It was high doses, but I don't recall.

Q. OK. We can deal with that tomorrow.

Everyone in any urban environment has some asbestos exposure, isn't that right?

A. That's right.

Q. Most of those people don't get asbestos disease, do they?

A. That's correct.

Q. We have defense mechanisms to protect the lung, don't we?

A. That's correct.

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Q. And you talked a little bit about the mucociliary escalators, that is one of the defense mechanisms. Is that correct?

A. That's correct.

Q. And the macrophages are another defense mechanism that you mentioned?

A. That's correct.

Q. So the macrophages actually help, if you breathe in a small amount of asbestos, help to take care of that in the lung, isn't that right, by putting enzymes on it?

A. That's the attempt.

Q. Now, the smoking actually inhibits the mucociliary escalator, doesn't it?

A. Correct.

Q. How does it do that?

A. I don't know the mechanism, but we know that it is, through the time period, toxic to the cilia. The cilia are tiny little hairs in the windpipe that don't beat the way they normally do, don't wave the way they normally do.

Q. In general, the risk of lung cancer from asbestos is a dose response, isn't that right?

A. That's correct.

Q. In other words, the more you get, the worse the problem?

A. The higher the level of exposure, the greater

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risk of lung cancer.

Q. Do you agree that you need to have underlying asbestosis before asbestos exposure can be attributed as a causal factor in connection with the development of lung cancer?

A. No, I don't think there has been enough proof of that.

Q. But a number of people do hold that, including such people as Andrew Churg, is that correct?

A. That's correct.

Q. Who is Andrew Churg?

A. He is a pathologist at the University of British Columbia who has done a lot of work with cancer-related pathology.

Q. He has written a textbook on this?

A. That's correct.

Q. You haven't written any textbooks on this?

A. That is also correct.

Q. You haven't written any chapters on asbestos, have you?

A. No, I haven't.

Q. Do you know Dr. Casey Morgan?

A. I know that he is a coauthor of an occupational lung disease test.

Q. Do you know how many books and chapters in

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textbooks he has written on occupational lung disease?

A. No.

Q. Do you know how many articles and books he has written on asbestos?

A. No.

Q. Would you agree that he is one of the world's leading experts on this subject?

A. I thought his strong point really was coal workers pneumoconiosis and silica rather than asbestosis.

Q. Why don't you tell the jury what pneumoconiosis is?

A. Coal inhalation is a dust disease of the lung and we call it coal workers pneumoconiosis. We don't see it in this part of the country, but I believe Dr. Morgan has been involved in the study of that for many years, and the silica causes, again, the pneumoconiosis, in this case a scarring of the lung caused by silica.

Q. So it is similar to asbestos in the sense that you breathe in a dust and it causes scarring to the lung which results in disease, is that right?

A. To that extent, yes.

Q. Do you have his book in your library?

A. Yes.

Q. How many of his books do you have?

A. I have one book by him.

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Q. Is it something you refer to periodically?

A. Not the asbestos chapter but for other things I have. For coal I have, and for silica.

Q. It is true, isn't it, Doctor, that a substantial body of opinion in the published medical literature disagrees with you and states that asbestosis is necessary before you can draw a cause-and-effect relationship between lung cancer and a preceding asbestos exposure, isn't that true?

A. That opinion has been stated in the literature, correct.

Q. A substantial body of that opinion?

A. A fair number of people, yes.

Q. Dr. Jurg's book, "Modern Pathology," you actually have that book in your library also, don't you?

A. That's correct.

Q. And you refer to that on occasion?

A. I have.

Q. Now, we were talking about smoking and the smoking risk. Let's go back to your report which you have in front of you. What I want to know is precisely what it is Mr. Buckley told you about his smoking history when he came to see you, and give us the date again, if you would.

A. February 4, 1994.

Q. OK.

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A. He quit cigarettes two and a half years ago. He said he smoked less than one pack per day starting age 17.

Q. He told you less than one pack a day?

A. That's correct.

Q. Would your opinion change at all in this case if you knew he actually smoked at least one pack a day for that twenty-year period?

A. No.

Q. Did he tell you when he saw you that he was actually smoking one cigarette a day?

A. I don't recall.

Q. Well, you didn't write that down?

A. That's correct.

Q. Doctor, do you know many people, based upon your seeing what you say are patients or clients or whatever --

A. Patients.

Q. Patients. Well, this particular patient was sent by a lawyer, isn't that right?

A. He is still my patient.

Q. Was he sent by a lawyer?

A. Yes.

Q. Mr. Goetsch.

A. Correct.

Q. When he was sent there in 1990 to your colleague, he was also sent there by Mr. Goetsch, isn't that right?

A. I believe so.

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Q. And both exams were completely normal, is that right?

A. That's correct.

Q. You did pulmonary function tests and they were normal?

A. Yes.

Q. And you did x-rays and they were normal?

A. Correct.

Q. Doctor, usually when you testify in these cases you bring in the x-rays, don't you?

A. No, it depends on the disease.

Q. Well, if it is a lung cancer case.

A. It depends on how good, you know, how clear the x-ray is. They are often not available. If they are available and they illustrate something useful, I will show them.

Q. Sometimes they are not available because you didn't actually treat the patient or see the patient?

A. That's correct.

Q. But, for example, last year when you testified in a case across the street you brought in x-rays to show the jury where the asbestos-related disease was, didn't you?

A. I don't recall the specific case, but I have brought them in with cases.

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Q. Does the Princiotta case mean anything to you?

A. Yes.

Q. Do you remember bringing in the x-rays?

A. I still don't recall. It was quite likely because I do sometimes.

Q. Doctor, there are what is called ILO standards, isn't that right?

A. That's correct.

Q. And what they do is, they mark, with respect to x-rays, what is shown on them in terms of the extent or the seriousness of the scarring, isn't that right?

A. It's the system we use to quantify the amount of scarring that we see on the x-ray.

Q. And they go from zero zero to three three?

A. Correct.

Q. And three three is the most serious, isn't that right?

A. Most advanced.

Q. The most scarring?

A. That's correct.

Q. It basically looks like bubble gum across the lungs?

A. Well, that's never occurred to me before. No, I wouldn't say it looks like bubble gum across the lungs.

Q. How would you describe it?

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A. A very dense collection of white scars, usually at the lower part of the lung fields.

Q. And the lowest is zero zero, isn't that right?

A. That's correct.

Q. And even though it is zero to three, there are actually nine different ones because you have zero zero, zero one, one one, two one, all the way up to three three?

A. That's correct.

Q. And Mr. Buckley's x-rays both in 1990 and 1994 were zero zero; is that right?

A. That's right.

Q. That means he has absolutely no asbestos-related disease?

A. That's right.

Q. And he has absolutely no pleural thickening, isn't that right?

A. That's right.

Q. Doctor, haven't you testified in the past that pleural thickening usually develops within ten years?

A. No. Usually?

Q. Haven't you taken the position that latency can be as short as five to ten years for lung cancer, Doctor?

A. It can be. It usually is not. Usually we don't see it for ten years.

Q. Doctor, have you testified in cases where you

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have actually testified that the lung cancer causally related with the latency period was less than fifteen years?

A. I don't recall. I think there may have been a case between ten and fifteen years, but it hasn't come up frequently.

Q. It came up last year in the Princiotta case?

A. It may have, but again it doesn't come up frequently.

THE COURT: Would this be a good time to break?

MR. LANDMAN: Your Honor, I was wondering, though, the letters, could I just published them to the jury? I can read them quickly before the jury goes. Would that be all right, the letter that he we introduced?

THE COURT: Yes.

MR. LANDMAN: It is two paragraphs.

THE COURT: All right.

MR. LANDMAN: Thank you. The letters are dated February 17, 1988, and they are written --

THE COURT: I understand the witness has an appointment and he doesn't have to listen to these letters.

MR. LANDMAN: The witness can go and come back tomorrow morning, I guess. Or tomorrow afternoon I guess you are coming?

THE WITNESS: Right.

THE COURT: OK. You don't have to listen to

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these letters if you don't want to.

THE WITNESS: It doesn't matter to me.

THE COURT: I understand you have an appointment.

MR. GOETSCH: What time will the witness be available tomorrow?

THE WITNESS: 12:30.

MR. GOETSCH: All right.

(Witness excused)

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DR. STEVEN MARKOWITZ, resumed.

CROSS-EXAMINATION (Continued)

BY MR. LANDMAN:

Q. Good afternoon, Dr. Markowitz.

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Just so we get everything in context, you basically started working at Mount Sinai and finished your residency in 1986, is that right?

A. I finished my residency in '86, that is correct.

Q. When did you start at Mount Sinai?

A. 1984.

Q. You finished your residency, completed your medical training in 1986?

A. Correct.

Q. By 1988 you were out requesting asbestos work; is that right?

A. I was open to the possibility of testimony.

Q. Doctor, did you bring those animal studies with you today?

A. Yes.

Q. Can I have those, please?

A. Sure. They are in my briefcase.

Q. Okay. Why don't you stay there. We will take a mid afternoon break, with the court's permission and we can get them then.

A. I can get them now. It is easy enough.

Q. Okay. Thank you.

Doctor, you agree that the smoking risk continues for at least 20 years after someone quits; isn't that right?

A. So far it has been studied to about 20 or 25

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years and it continues at least 20 years.

Q. So, in other words, in fact, you agree that the risk of developing lung cancer in an ex-smoker is still greater over the course of a lifetime than a non-smoker even 20 years or more after someone quits?

A. That is correct. It decreases at the time when the person stops, decreases compared to what it would be, but the risk is still elevated and decreases over time and appears to approach the same as background risk, the smoker risk, by about 20 percent.

Q. 10 percent of all cigarette smokers get lung cancer; is that correct?

A. That is correct.

Q. How many people get lung cancer in this country from any cause?

A. Half a million.

Q. You agree that a chest x-ray is the best method of determining whether or not someone has asbestosis?

A. It is the simplest method, and certainly among routine tests it is the best method.

Q. You are not a B reader, is that right?

A. No, I am not.

Q. Would you tell the jury what a B reader is?

A. A B reader is a physician who takes a test given by the government certifying they are an expert in reading

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chest x-rays for dust diseases of the lung.

Q. In formulating your opinion in this case, did you see a report from Dr. Frank Pernell who did a B reading of Mr. Buckley's x-rays?

A. No.

Q. But you wouldn't be surprised to know that that is an 00?

A. That was my reading as well.

THE COURT: You can read it even though you are not certified?

THE WITNESS: That is correct. I am not certified but it is part of my specialty.

Q. You just never took the test?

A. That is correct.

Q. Why don't you explain to the jury what this test consists of?

A. I don't know that much about it. It is in Morgantown, West Virginia. I think it is about four or five or six hours. It is reading x-rays and determining them according to this scale. Then there is -- they grade a certain percentage right.

Q. Doctor, you agree that lung cancer is the leading cause of cancer death in the United States in men?

A. Correct.

Q. 100,000 men die of lung cancer each year?

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A. 100 what?

Q. 100,000.

A. I think more than that, actually.

Q. 350,000 people die each year due to smoking in this country?

A. Roughly.

Q. 85 to 90 percent of lung cancer cases are due to smoking?

A. In that range.

Q. How many men do die each year of lung cancer?

A. I thought it was 110, 120,000; in the same range.

Q. More people die in this country from smoking than die from automobile accidents, homicides, AIDS, put together; isn't that right?

A. Correct.

Q. Smoke induced diseases are the most preventable diseases in this country, isn't that right?

A. It is the most preventable common disease. There are a host of diseases that are preventable. Smoking-related diseases are among them.

Q. Your lung cancer risk is higher if you start smoking at an earlier age?

A. That's true.

Q. As early as 1979 the Surgeon General said that typically a one-pack-a-day smoker takes in between 50,000

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and 70,000 puffs; isn't that right?

A. I wouldn't know that number.

Q. How many puffs do you think a smoker takes, in if you know?

A. I don't know.

Q. Doctor, tobacco smoke, you agree, is a unique chemical with over 1500 known chemical compounds in it?

A. It is not a chemical.

Q. It has 1500 chemical compounds in it?

A. That is correct.

Q. Just tell us what chemical compounds are.

A. These are unique chemical substances. They have their own chemical formula and presumably their own behavior.

Q. By 1989, at least, 43 of those were found to have been carcinogenic?

A. I don't know the exact number. Numerous have been found to be carcinogenic.

Q. That means they cause cancer?

A. That is correct.

Q. The duration of smoking, how long you were a smoker, is more important than how intense a smoker you are, isn't that correct?

A. I know duration is important but I don't know relative to intensity at any given duration. I don't know

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how they compare.

We usually look at smoking history in pack years which is the duration and intensity combined. One pack per day for 40 years is 40 pack years, 2 packs per day for 40 years is 80 pack years. That is the usual measurement we use for smoking.

Q. In other words, smoking over a longer period of time is more important than how much you are smoking at a given time but they are both important, would you agree with that?

A. No. I agree that both are important. I don't know, as I said before, the relative importance of it.

Q. Doctor, you remember giving testimony in the Princiotta case last year?

A. Yes.

Q. At page 185 you were asked this question, and this testimony was given before Justice Helen Friedman on April 5, 1994, page 185:

"Q Doctor, in addition, the risk from smoking related to intensity of exposure which means the number of cigarettes smoked per day, how long you smoked but duration, has a more powerful effect, isn't that correct?

"A. More powerful than the intensity?

"Q. Than the intensity. In other words, meaning over a longer period of time is more important but

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both are important. That is more important?

"A. I believe that is true."

That is basically your testimony?

A. That is the same as my testimony today.

Q. Okay. Obviously, Mr. Buckley's smoking history is important to you?

A. Yes.

Q. Your understanding is that he was basically a one pack a day smoker for 20 years?

A. Less than one pack per day for 20 years.

Q. Then your understanding is that he quit when?

A. Two-and-a-half years before I saw him. It was a year ago so it would have been 1992 or late 1991.

Q. Doctor, have you learned since then that he has taken up smoking?

A. I have been told that he smokes one or less cigarettes per day.

Q. Is that based upon what Mr. Goetsch told you?

A. That is what Mr. Goetsch told me. That is what Mr. Buckley told me. For that matter, he may have told that to me at the time I saw him a year ago but it is not the kind of smoking I would think is important and wouldn't have written it down.

Q. When did you learn about this one cigarette a day from Mr. Goetsch?

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A. Again, I may have been told a year ago when I saw him. I don't recall then. This week I was told that he smokes a cigarette or less per day by Mr. Goetsch and Mr. Buckley.

Q. Did Mr. Goetsch come see you last week in your office?

A. No.

Q. Did he call you on the phone?

A. No. We spoke on the phone.

Q. Did he tell you over the telephone that Mr. Buckley was smoking one cigarette a day?

A. He may have. I don't. recall. He told me but I don't recall whether it was in person or on the phone.

Q. Doctor, you see a lot of people who are complaining about occupational illness, right?

A. That's correct.

Q. You take a lot of smoking histories from people, isn't that right?

A. That's correct.

Q. Do you see many people who smoke cigarettes at a rate of one per day?

A. Occasionally. Most people either smoke more or they have given up entirely, but many people, I can't give you percentages, on their way to quitting entirely take an occasional smoke.

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Q. Doctor, you know that sometimes people don't give honest histories; not because they are being dishonest but they sometimes understate their smoking; isn't that right?

A. I have no recourse to that information usually except for what the patient tells me so I wouldn't know.

Q. You know what OSHA is; isn't that right?

A. That's correct.

Q. They regulate the safety and health of workers in the United States?

A. That's correct.

Q. You are aware of the time fact that they have proposed that smoking be banned in all workplaces in the United States?

A. Something -- either a full ban or a near ban or something like that. Certainly, a big change.

Q. As an occupational specialist you are not sure if you are in favor of that?

A. Well, in principle, I am in favor of it. The question is the feasibility of getting there. Whether there is a full ban or mostly a ban, I haven't really thought through.

Q. Passive smoking increases the risk of lung cancer and other disorders?

A. That's correct.

Q. Passive smoke is what?

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A. This is considered smoking from -- excuse me, inhaling cigarette smoke from the air when you are not the active smoker, so it is being near someone in the room with someone who does smoke and breathing in the cigarette smoke that -- through that route rather than directly by taking cigarettes yourself.

Q. The studies have shown that, in fact, passive smoking, passive smoke at an early age is particularly harmful because the lungs are still growing; if your parents smoke and you are in the same room or same environment?

A. That's correct.

Q. Did you take a history from Mr. Buckley to find out whether or not his father ever smoked?

A. No. I didn't consider it relevant.

Q. Did you take a history as to whether or not his mother smoked?

A. No.

Q. Did you take a history as to whether or not his wife smokes?

A. Yes.

Q. Does she?

A. No.

Q. Why didn't you think it was relevant?

A. Because I am looking at what his current future risk is of lung cancer and asbestos-related disease, and, to

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my knowledge, passive smoking by children affects their frequency of respiratory infections, the intensity or severity of their asthma, but I am not-aware of any studies that show the exposure to passive smoke as children affects their lifetime risk of cancer, their cancer risk as an adult, which is what I was concerned about in this case.

Q. Hasn't the Surgeon General concluded that, in some respects, that passive smoke is the same as if you are smoking?

A. I don't know that particular language. Certainly, there are constituents of passive smoke that are the same as of active smoke.

Q. They both have the chemicals in it?

A. Some chemicals.

Q. They both have carcinogens?

A. Yes.

Q. Since you have already testified that you generally agree that duration is more important than intensity, wouldn't passive smoke exposure as a child add on to someone's duration of how long they have been smoking?

A. In theory, yes. My point is that the studies haven't been to show, to document that lung cancer risk extends into -- well, is expressed in adulthood from childhood exposure.

Q. Do you know whether or not Mr. Buckley's

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co-workers ever smoked at work?

A. No.

Q. You didn't ask about that?

A. No.

Q. You, yourself, don't consider passive smoking in the workplace as an occupational disease?

A. Passive smoking as an occupational disease?

Q. Yes; in the workplace?

A. Smoking is a habit, it is not a disease. I am not sure what you mean.

Q. Do you consider that passive smoke in the workplace can lead to occupational disease? In other words, if you are exposed to people smoking in your work environment, would you consider that to be something that could cause occupational disease?

A. I haven't really thought that through.

Q. You know that in 1986 the Surgeon General devoted the entire issue of the report on smoking to passive smoke; isn't that right?

A. That's correct. Some year; I don't know which year.

Q. You actually read part of that report?

A. That's correct.

Q. Doctor, isn't it true that you have said in the past that you wouldn't be surprised if some patients

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underestimated their smoking; that wouldn't be a surprise to you?

A. That would not surprise me. I don't know if I said "in the past," but it wouldn't surprise me.

Q. Doctor, the Surgeon General of the United States is -- not the name of the person -- but what generally is their responsibility as far as you understand it?

A. They are really the premiere health educator in the country.

Q. Doctor, you trained in psychology; is that right?

A. As an undergraduate.

Q. What did you tell Mr. Buckley when with you saw him, if anything, with respect to what you thought his condition was?

A. I told him that he had no -- currently had no asbestos-related disease. There was no clinical impact on his lungs that could be seen at this time but that he did have significant exposure in the past and that he had some increased likelihood of developing an asbestos-related disease in the future.

Q. Doctor, did you give him any type of quantification as to what that increased risk was at that time?

A. No. I didn't spell out that much.

Q. Why didn't you?

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A. Because, again, with patients and even yesterday here, I don't focus in on the quantitative approach. I more talk about sort of trying to find meaningful terms in terms of what kind of risk there is.

Q. You told him to make sure he doesn't smoke?

A. I told him not to resume cigarette smoking.

Q. Doctor, when you say he had significant exposure to asbestos at work, that was based on what he told you?

A. That is correct.

Q. Yesterday when you testified you said that he had one to two hours of exposure everyday on the average?

A. That's correct.

THE COURT: Let me interrupt. You used the word "patient." He didn't come to you for health advice as to what he should do? How is he your patient? Isn't a patient someone who comes to you for treatment?

THE WITNESS: He was my patient. He came to me for health advice.

THE COURT: He didn't come to you for the purpose of finding out how he should conduct himself; that wasn't your purpose?

THE WITNESS: My purpose was, in my view, was to determine whether he had any asbestos-related disease.

THE COURT: For what purpose? Not for helping him, for a lawsuit?

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THE WITNESS: No. I knew I was going to testify in a lawsuit if it ever came to that but when I saw him I saw him as my patient as a consultant and I gave him advice as to his health and how he should conduct himself in the future. I couldn't do otherwise as a physician.

Q. Let me make sure I understand. Whenever a lawyer sends someone to you, you count that person as a patient?

A. That's correct. I am not his primary care physician, I am not the person who provides ongoing care, but it is a clinical consultation and I give him expert advice about what he has and what he should do.

Q. With respect to his occupational exposure, you didn't factor in at all the fact that he was sent by a lawyer and he already had a lawsuit pending and obviously he wanted to -- it would be in his interest to maximize his exposure; you didn't consider that at all, did you?

A. Again, my information about how much -- his work habits were coming from him. I have no independent

confirmation of that. That is always the way it is with patients.

In this case I got some other information about there being 10 percent or 15 percent or 20 percent of some bulk samples taken from the tunnel.

Q. I am focusing on his work, his job.

A. I am answering the question. There was a certain

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percentage of asbestos in the products he worked with. The information I get is from him. That is true of any patient.

Q. Right, but have you ever had a situation where someone who was a plaintiff in a lawsuit came and talked to you not as strictly for clinical treatment or anything but as a plaintiff where they misled you at all?

A. There was one patient, I don't know if he misled me, but there was one patient who came to me, who was sent by a lawyer, this was several years ago, who told me one thing and called me up a day or two later and changed that particular number or line. I don't recall the details. That is the only time it ever happened to me.

Q. Do you know if one of Mr. Buckley's jobs was to do any type of inspections at Grand Central Terminal?

A. Before 1985 his job did involve inspection.

Q. From 1985 to 1988?

A. From '85 through '88 I was told that it was mostly or fully repair work or replacement of pipes and related materials.

Q. You were told that it was mostly ripping out pipe insulation in old pipes or installing new pipes; is that right?

A. Pipes, flanges, valves and assorted material. That was his dominant activity for at least two-and-a-half years.

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Q. You have psychiatrists and psychologists and social workers at Mount Sinai; isn't that right?

A. That's correct.

Q. Are there any in the occupational medicine group?

A. There is a social worker.

Q. When you saw Mr. Buckley and met with him, Dr. Nicholson was there also?

A. That's correct.

Q. You didn't refer Mr. Buckley to a psychiatrist, did you?

A. No.

Q. Did you refer him to a psychologist?

A. No.

Q. Did you refer him to a social worker?

A. I don't believe so.

Q. You have, in the past, when you have seen patients, patients, made referrals to those types of people, haven't you?

A. Occasionally to social workers, never formally to a psychiatrist and I don't believe to a psychologist either.

Q. You know that your colleagues that are treating sick people, for example, colleagues that may be treating someone for lung cancer or some other fatal disease periodically will send someone to a psychologist or psychiatrist to talk to them about all of that, don't you?

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A. I imagine that is true.

Q. When you interviewed Mr. Buckley did he tell you he had had any type of psychiatric or psychological counseling?

A. Not that I recall. I didn't specifically ask, either.

Q. Doctor, in drawing your opinion in this case you were relying on Dr. Selikoff's study that compared smokers and non-regular smokers, weren't you?

A. That's correct.

Q. Those were insulation workers?

A. That's correct. In part. That is not the only ones. In part, yes.

Q. That is the leading study that we have heard a lot of talk about cohorts and all of this, this long longitudinal study; isn't that right?

A. I mentioned it once, yes. Beyond that, I wouldn't know.

Q. Before we get to this, what is your connection with Dr. Nicholson?

A. He is a colleague at Mount Sinai.

Q. Who brought Dr. Nicholson into this case; did you or did he bring you into this case?

A. You asked me that yesterday. I have no idea. He did not contact me about this case nor did I contact him.

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Q. You two interviewed Mr. Buckley together?

A. That is correct.

Q. It just sort of happened, as far as you know?

A. No. I think actually Mr. Goetsch arranged that.

Q. That is what I was trying to get at. Tell me how that all came about.

In other words, you get a call from Mr. Goetsch and he says, look, I want to send this person over to see you, Mr. Buckley, right?

A. Correct; something like that.

Q. Then you set up an appointment?

A. Correct, or Mr. Buckley calls our clinic and they set up the appointment.

Q. Then Mr. Buckley shows up and, lo and behold, Dr. Nicholson is there?

A. No. I knew several days before, I think a week before, Dr. Nicholson told me he was going to be present.

Q. He told that you Mr. Goetsch had contacted him as well?

A. He didn't tell me that but -- I didn't tell Dr. Nicholson that and I didn't know exactly when Mr. Buckley was given his appointment. It wasn't me that arranged it so I don't know.

Q. When you examine patients as opposed to people who are sent by lawyers does Dr. Nicholson usually sit in

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with you?

A. All the people I see, whether they are referred by doctors, lawyers or whomever, are considered patients

for the purpose of consultation and, no, Dr. Nicholson doesn't usually sit in with me.

Q. What Dr. Selikoff was studying was the relationship between asbestos and smoking; isn't that right, in part?

A. In part, yes.

Q. You told this jury that there is a synergistic effect between asbestos and smoking; is that right?

A. That's correct.

Q. That is based in large part on that study?

A. There are other studies but that is the largest study that I am aware of.

Q. From that you then said that Mr. Buckley's risk has increased how many fold?

A. I don't think I said that at all actually.

Q. I think that what your testimony was that his risk has increased by a certain percent; is that right?

A. I don't recall exactly. I am not sure exactly what you are driving at.

Q. I am just trying to get you to answer.

A. If you make the question clearer, I will be glad to answer it.

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Q. Doctor, isn't it true that what Dr. Selikoff really compared were smokers and non-regular smokers, not non-smokers?

A. He defined nonsmokers as those who would smoke less than six months.

Q. They are specifically said to be non-regular smokers; isn't that right?

A. Could be. He could have referred to them as non-smokers but the definition was less than six months.

Q. Not smoking regularly doesn't mean that you never smoked at all?

A. Not necessarily.

Q. Doctor, the way Dr. Selikoff did this, he asked them the questions about their smoking history in 1966 but he wrote the papers in 1976; isn't that right; or based upon questions in 1976?

A. He questioned them in the late '60s and then looked at mortality in the beginning between 1966 and 1976.

Q. He never went back to see the people that were having the mortality, whether they had started to smoke?

A. Correct.

Q. That ten-year period?

A. After the time when he interviewed them.

Q. After the first interview in 1966?

A. After the only interview in 1966. I don't

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believe it was 1966. I think it was 1969.

Q. These "non-regular smokers" could have started smoking during that ten-year period, couldn't they have?

A. Yes.

Q. You agree that former smokers often fill out-patient questionnaires saying that they are actually non-smokers, don't you?

A. I have never seen a study about that.

Q. You didn't? Didn't you see it in the Princiotta case?

A. I don't recall. If you are referring to a specific study I will be glad to take a look at it.

Q. Okay.

Doctor, you are familiar with a publication called Chest; aren't you?

A. Yes.

Q. It is a magazine that you actually get at Mount Sinai?

A. Correct. I personally don't get it but Mount Sinai gets it.

Q. Chest, by its name, is about the lungs and things such as that?

A. That's correct.

Q. There was an article that came out in January 1992 is by Dr. Kasi S. Stridhar and William Raub where they,

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at page 23, concluded that former smokers often fill out the patient questionnaires as a non-smoker.

Actually you were asked about this at the Princiotta case so you saw it there. Maybe you forgot. That is understandable.

A. I hadn't seen that article before.

Q. You saw it there a year ago?

A. I don't recall, to tell you the truth. It may have been waved at me.

Q. In any case, you don't disagree with their findings?

A. I haven't viewed the study so I can't say that.

Q. Do you want to take a look at it now?

A. Sure. If you want to ask me specific questions, sure.

Q. Just take a look right there. Actually, to save time, the only question I want to ask you is did I accurately read what they concluded?

A. Yes, that is what it says here.

Q. Doctor, now, Dr. Selikoff's study was of 17,800 insulators; isn't that right?

A. That's correct.

Q. What he was trying to determine is how many increased cases of cancer occurred because of exposure to asbestos or smoking above what you would normally expect in

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the population; isn't that right?

A. That's correct.

Q. Out of that group of 17,800 insulators, when they went back and looked at them as you say ten or more years after that they found a total of four non-regular smokers who got lung cancer; isn't that right?

A. That's correct, although you have to look at how many deaths total there were, not total number of people in the study since most of them had not died.

Q. How many smokers who got lung cancer increased over that period of time?

A. I don't recall.

Q. It was a dramatically large number; is that right?

A. It was large, yes.

Q. Dr. Selikoff actually concluded that the vast majority of insulation workers usually smoked?

A. That's correct.

Q. He also concluded that insulation workers work in enclosed spaces; isn't that right?

A. I don't recall seeing that specific line but they certainly did it many times.

Q. Generally, insulators also work in confined boiler rooms and other small spaces?

A. That's correct.

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Q. Thus, it is safe to say they were exposed to passive smoke?

A. I wouldn't say that. I don't know.

Q. You wouldn't say that?

A. I don't know.

Q. On page 207 from the same transcript, you were asked, starting at agent line 12:

"Q. Didn't Dr. Selikoff conclude that the vast majority of insulation workers usually smoked?

"A. That is true.

"Q. And, therefore, they were exposed to passive smoking?

"A. Did he conclude that? Are you saying he concluded that?

"Q. No. Would you agree?

"A. Yes. I think it is probably safe to say that they were exposed to passive smoking."

You agree with that, right?

A. Certainly Dr. Selikoff did not look at the issue of passive smoke. If you ask me whether insulators were sometimes with co-workers who smoked or themselves who smoked, in fact, at the job site, I would say that is likely to be true. It was never looked at as an issue.

Q. In fact, in 1968 Dr. Selikoff did a study that was reported in the journal of the American Medical

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Association where none of the individuals who did not smoke who were exposed, heavily exposed to asbestos on their jobs, got lung cancer; isn't that right?

A. I believe that is true. That was the smaller insulator group.

Q. In fact, there has never been a follow up on that study, has there?

A. You have to show me the study.

Q. Just as I read from it, it is asbestos exposure, smoking neoplasia. What is a neoplasia?

A. Cancer.

Q. It is by Irving J. Selikoff, E. Cuyler Hammond and Jacob Churg and states, "Of 87 non-cigarette smokers none died of bronchiogenic carcinoma, "which is a type of lung cancer; is that right?

A. Correct.

Q. Take a look and just tell me whether or not there has been a follow up study of that?

A. This is the group of insulators from New York and New Jersey?

Q. Right.

A. Total number of workers was 370 and this was a subset of the 17,800 so it has been followed up but they have been merged with the larger group of North American insulators.

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Q. That is the 17,100?

A. 800.

Q. The 17,800 and of that there has been a total of four non-regular smokers who got lung cancer; isn't that right?

A. Smoking information was available on about 12,000 out of the 17,8,000. That number four was true for the first ten-year followup, between 1966 and 1976.

The question is four out of how many. How many deaths were there out of non-smokers? I don't recall the exact number but it was in the -- a few hundred at most; it was not the 17,800.

Q. You have previously said these non-regular smokers are smokers that smoked less than six months?

A. That's true.

Q. When was the last time you saw anyone in science draw a conclusion based upon four cases out of 17,800?

A. It is not the only piece of information that is available, but it is important. This is the largest study available and even within that group because there were so many smokers it was a difficult issue to study because there were relatively non-smokers. It is an important number. it doesn't stand alone but it is an important study.

Q. Did Dr. Selikoff think it was important?

A. That study?

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Q. Yes.

A. Yes.

Q. By weight, these workers who were studied had actually worked in the insulation trade for at least 20 years; isn't that right?

A. Correct.

Q. Doctor, that number four could have been a little higher and could have been a little lower?

A. That's correct.

Q. Because of the statistical variation?

A. That's correct.

Q. The smaller the numbers in any particular study the less certain one can be that the single number obtained actually represents the real number; isn't that right?

A. No. Actually the amount of --

Q. Do you agree with that, yes or no?

A. No. The amount of uncertainty depends upon not so much the size of the number as the number expected.

Q. You disagree with what I just said?

A. Well, it is just a more complicated topic. I don't really disagree. The smaller -- smaller numbers are uncertain.

Q. That means the more uncertainty, the less we are sure that that number, 4 out of 17,800, is actually a real number?

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A. It is a real number but it could easily have been 3 or 5.

Q. Page 211, continuing with-your trial testimony:

"Q. Didn't Dr. Selikoff also state because of the small numbers the ratio is subject to specific statistical sampling variation?

"A. That is true.

"Q. What does "specific statistical sampling variation" mean?

"A. It means that the actual number four could have been a little higher, could have been a little lower. The smaller the number in any particular study, the less certain we are that the single number obtained actually represents the real number." That was your testimony then?

A. Okay.

Q. By the way, there is nothing in that study or the cohorts that have followed it that suggest that they

ever studied people who had never smoked at all, isn't that correct?

A. Well, again we get back to Dr. Selikoff's definition of his non-smoker which was smoking for less than six months. As far as I know, there wasn't ever a defined group of people who had never touched cigarettes. (Continued on next page)

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A. It is a real number but it could easily have been 3 or 5.

Q. Page 211, continuing with your trial testimony:

"Q. Didn't Dr. Selikoff also state because of the small numbers the ratio is subject to specific statistical sampling variation?

"A. That is true.

"Q. What does "specific statistical sampling variation" mean?

"A. It means that the actual number four could have been a little higher, could have been a little lower. The smaller the number in any particular study, the less certain we are that the single number obtained actually represents the real number."

That was your testimony then?

A. Okay.

Q. By the way, there is nothing in that study or the cohorts that have followed it that suggest that they ever studied people who had never smoked at all, isn't that correct?

A. Well, again we get back to Dr. Selikoff's definition of his nonsmoker which was smoking for less than six months. As far as I know, there wasn't ever a defined group of people who had never touched cigarettes. (Continued on next page)

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Q. And, Doctor, Mr. Buckley is not an insulator, is he?

A. No, he is not.

Q. If you take a look at Dr. Selikoff's numbers, 17,800 people were studied, is that right?

A. Were in the study at the start.

Q. Right. And 10 percent of that would be 1,780. 1 percent would be 178. And .1 percent or a tenth of a percent would be almost 18, and the number that came up was actually a little bit less than .025 of a percent. Isn't that right?

A. That's correct.

Q. And you, in part, rely on that with respect to the synergistic effect of smoking and asbestos.

A. No, I think the important number is the number of deaths. The number of deaths was not 17,800. It was, the first ten years of the study, about a couple of

thousand. Secondly, you have to look at the number of deaths among nonsmokers. We only had information on smoking for about two-thirds of the total group for about 12,000. And the nonsmokers were in the vast minority of that group. So you are really looking at -- the single number you really need to focus on is 4 out of how many nonsmoking deaths. It is not 4 of 17,800.

Q. So you would have expected, out of that number of

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the never smoked regularly, that there be .7 deaths, isn't that right?

A. That's right.

Q. And instead there was reported to be 4 of the never smoked regularly.

A. That's right.

Q. And the numbers of people who had smoked was 268 deaths for people who had a history of cigarettes, isn't that correct?

A. That's correct. It was as of '76.

Q. Right.

A. The number of nonsmokers were about 900, I believe.

Q. The article was actually published in 1979.

A. Right. But it describes follow through 1976.

Q. Do you agree with this statement that Dr. Selikoff wrote: "However, because of the small numbers the ratio is subject to considerable statistical sampling variation. By chance, the observed number might have been as low as 1 or 2 or as high as about 9. Therefore, all we can say is that the actual mortality ratio is probably more than one but could be as high as 12 or even a little higher. In any event, the mortality ratio for men who never smoke regularly was very small as compared with the mortality ratios of the cigarette smokers."

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Do you agree with that?

A. Could I see that?

Q. Surely.

A. I would like to verify what you are reading.

Q. Absolutely. The part in yellow (handing to the witness).

A. All right.

Q. Did you solicit any information at all from Mr. Buckley -- oh, I am sorry, did I accurately read that?

A. Yes.

Q. Did you solicit any information at all from Mr. Buckley about his hobbies or outside activities?

A. I believe I did.

Q. Tell us what they are.

A. I don't really recall. There are none that involved asbestos exposure or any exposure to any lung carcinogen.

Q. Based upon what Mr. Buckley told you?

A. Of course. As you said, I spoke with Mr. Buckley at the interview.

Q. Doctor, just talking a little bit about your various studies that you worked on, you mentioned something on direct examination when Mr. Goetsch asked you, something about firemen and you have done some studies on firemen?

A. Firefighters. One study.

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Q. Can you tell me a little bit about that study?

A. Sure. We examined long-term New York City firefighters, people who -- we raised the issue of whether firefighters had sufficient exposure to asbestos as to cause disease, because they are involved with building demolition in the process of fighting fires. In particular, after putting out a fire, it is their responsibility to make sure that there are no lingering embers, and therefore they need to part walls or take off insulation or the like. That is called the overall stage of a fire. That is exactly when they take off their masks, actually, because the fire is out and there is no obvious smoke in the air.

Q. And they have been working hard, it is hot, and they need to get some fresh air?

A. That's correct.

Q. Yes.

A. And so we raised the issue actually, they came to us with these questions -- as to whether there was sufficient exposure to asbestos to cause some scarring of the lungs. So we examined some 225 firefighters, pretty much all of whom had had at least 25 or 30 years from the beginning of work as a firefighter.

Q. What did you find?

A. Well, we found that the ones with a past history of exposure to asbestos, that is to say, prior to fighting

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fires, had a significant increase or about a third of them had some scarring of the lungs or pleura. Most of it was of the pleura, which we judged to be due to asbestos. But even looking at the group that had no other asbestos exposure other than fighting fires, that about 1 out of 7 or 8 had some limited scarring of the pleura, the covering of the lungs, indicating exposure to asbestos.

Q. That is, about three-quarters of what a fireman does is the overhaul work which is after the fire, pulling down the walls and ceilings in looking for the source of the flame to make sure they got the fire out; right?

A. I never said what percentage of their time is spent --

Q. Would you agree with that?

A. Actually, I don't know. Firefighters have different tasks at fires and you can't actually call all of them the same.

Q. You know who Andrew Churg is, don't you?

A. Yes. He is a pathologist at the University of British Columbia.

Q. And in fact is he the son of the Dr. Churg that worked with Dr. Selikoff on a lot of these studies?

A. Yes.

Q. And he has written a book on the Pathology of Occupational Lung Disease?

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A. Yes.

Q. You haven't written any textbooks on lung disease, have you?

A. No, I haven't.

Q. And, Doctor --

A. Actually, I edited a book that just came out on tuberculosis in the workplace.

Q. When you say edited, you mean that a lot of people submit articles and you basically are the one that helped decide, among other people, on what goes in and what doesn't?

A. Well, I wrote a couple of the articles in them, but I solicited the other authors for articles.

Q. Doctor, would you agree with Dr. Churg when he writes, with respect to occupational and environmental history, at page 3:

"It is important to be aware that exposure to hazardous agents can and do occur outside the workplace. It is often useful to solicit information on potentially hazardous avocational hobbies and do-it-yourself interests, the nature of the spouse's job, and proximity to major industries, demolition sites, and dumps. Because of the importance of cigarette smoke in producing lung disease in general, and because of the known and potential interactions between smoke and industrial agents, detailed knowledge of

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the patient's smoking history is mandatory."

You would agree with that? Nothing particularly controversial?

A. Yes.

Q. Would it change your opinion at all in this case to know that Mr. Buckley, in addition to working as a pipe fitter, does some firefighting on a volunteer basis?

A. I didn't learn of that. I asked in detail how often he fights fires, what operation of the fires he is involved with, and the like.

Q. And did you know in fact that there is a brigade at Metro-North where he could be asked to fight fires at Grand Central Terminal?

A. What is the question?

Q. Did you know that?

A. No, I didn't.

A. Actually, I mean, I didn't write it down, I don't recall it being said. He may have volunteered it.

Q. But you didn't write it down.

A. That's correct.

Q. And you don't have any recollection of it now?

A. That's correct.

Q. Doctor, we were talking a little bit about latency period, and you would agree that that latency period could be as low as ten years for lung cancer, is that right?

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A. Could be. The risk appears to begin, at least these days, to begin at ten years.

Q. What is Mr. Buckley's risk of lung cancer in the absence of any asbestos exposure from 1985 to 1988?

A. His absolute risk?

Q. Yes.

A. Given the smoking history of a little bit less than 20 years, a pack, with zero asbestos exposure?

Q. No one has zero asbestos exposure; we learned that this morning from Dr. Nicholson.

A. Zero occupational exposure. He would have some risk of lung cancer. I can't give you the absolute risk.

Q. But if he hadn't quit smoking that pack a day and had continued for another 20, 30 years, his risk would be about what?

A. His risk would be -- well, again I never said he smoked a pack a day. He told me he smoked less than a pack a day. His risk would be in the range of -- what is the total cigarette smoking you are saying?

Q. Assume 40 years.

A. 40, a pack, years would be a moderate level, it would be 3 to 4 to 5 times the background risk, depending on the study.

Q. 3 to 4 times as high as someone who is a nonsmoker?

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A. That's correct.

Q. Part of your opinion, according to your report, is you assume that Mr. Buckley had exposure to asbestos daily for two and a half years.

A. That is what I was told. I didn't assume it. That is what I was told.

Q. Isn't it true that the reason Mr. Buckley needs medical surveillance is not exclusively because of his asbestos exposure but because of his long history of smoking?

A. Well, it would contribute to the lung cancer risk. In that sense, it would contribute to the need for medical surveillance.

Q. Doctor, basically you would agree that people, once they get to be around 40, should have regular physicals, isn't that right?

A. 40 or 45. Between 40 and 50, I'd say.

Q. Doctor, you would also agree that somebody who has been a smoker for 20 years certainly falls in the group of people who should regularly have chest x-rays?

A. Well, actually, for cigarette smokers who have no known exposure, occupational exposure to asbestos, it isn't entirely clear whether x-rays would help them or not; that is to say, whether a regular x-ray would allow detection of the cancer in an early-enough stage for it to be cured. In

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the context of cigarette smoke and occupational exposure to asbestos, the fact that the lung cancer risk is higher, that group hasn't specifically been studied for utility of chest x-rays, but it would make sense

that it would be useful and that one stands a reasonable chance of detecting lung cancer early if the person has regular chest x-rays.

Q. And in fact if you catch lung cancer early, you can sometimes have surgery, and if you catch it too late, you can't have surgery,, isn't that right?

A. In general, yes.

Q. Doctor, when you saw Mr. Buckley, you wrote that he should have periodic medical surveillance for his health. Isn't that right?

A. That's correct.

Q. You also told him that he should not resume cigarette smoking, is that right?

A. That is correct.

Q. That was in February 1994?

A. That's correct.

Q. Doctor, you were sent several people by Mr. Goetsch over the last few years, weren't you?

A. In 1990 I was sent, I believe, two or three.

Q. Larry Brown?

A. Larry Brown was one.

Q. And also Daniel Nelson?

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A. That doesn't ring a bell, actually.

Q. Hugh Campbell?

A. Hugh Campbell's name sounds familiar.

Q. Duane Brooks?

A. I don't recall him.

Q. Let me just show you this and see if this refreshes your recollection (handing to the witness).

A. Well, Daniel Nelson, the physician down here is Ruth Lilis.

Q. She works with you?

A. At the time, yes. Hugh Campbell, my name is down here. Michael Buckley is Robin Herbert. Duane Brooks is Steven Levine. It is very clear at the bottom of the page who the physician is.

Q. And they all work with you?

A. They are all at Mount Sinai.

Q. In your group?

A. Dr. Lilis is pretty well retired.

Q. But in 1990, Doctor --

A. That's correct.

Q. -- they all worked at the Occupational Health Clinical Center?

A. That's correct.

Q. Doctor, you are the one who saw Larry Brown, isn't that right?

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A. That's right.

Q. And when you saw Larry Brown, you found out that, unlike Mr. Buckley, he wasn't a smoker?

A. Well, I saw him in 1990 and I haven't looked at his record since that time, but, as I recall, I don't believe he was a smoker.

Q. And you conclude that his exposure to asbestos was significant, isn't that right?

A. May I see the report?

Q. Sure. The first question is whether you concluded his asbestos exposure was significant.

A. What I said was, reading:

"Hence, Mr. Brown is unfortunately at increased risk for one or more of the diseases known to be associated with asbestos. Fortunately, he does not smoke cigarettes and is unlikely to be exposed to asbestos again. I advised him against either of those toxic exposures."

Q. I think there is a page where you said -- I can maybe approach and show you -- you said, "Unquestionably he had significant exposure to asbestos."

A. That's correct. That is what I said.

Q. Doctor, in this report, unlike the one -- by the way, this is also written to Mr. Goetsch?

A. I believe so.

Q. You remember that Mr. Goetsch sent you all these

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people, right?

A. I don't know what you mean by "all these people."

Q. Well, people we just went through.

A. Most of them were seen by other physicians at Mount Sinai.

Q. The other people, all right. Mr. Goetsch sent you Mr. Brown?

A. That's correct.

Q. Doctor, isn't it true that, because Mr. Brown was not a smoker, you never wrote there, as you did with Mr. Buckley, that he needed periodic medical surveillance? Yes or no.

A. The smoking factored into it, certainly, because --

Q. Question: Did you write in that report for Mr. Brown that he needed medical surveillance in his future?

A. I did not write that to Mr. Goetsch.

Q. And did you write that with respect to Mr. Buckley?

A. Yes, I did.

Q. And the difference between the two is one was a smoker and one wasn't?

A. Well, that is one difference. Mr. Buckley is now ten years from his onset of exposure to asbestos, because he began in '85, whereas Mr. Brown, when I saw him in '90, I

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believe that his exposure began in '87. So he was just three years. And since we don't expect to see any of the effects for at least ten years, it is a projection into the future to give him that advice. I may have given him that advice in person as a patient, but I did not write it in the report.

Q. Doctor, obviously, as someone who is an expert in occupational medicine, it would be unusual to write people should get an exam every three years or get an exam in five years or get an exam five years after exposure, isn't that right?

A. That's correct.

MR. LANDMAN: Your Honor, maybe if we took a break. I don't have much more time

for the doctor. I just need a couple minutes, and I can shorten this if now would be an afternoon break.

THE COURT: That is a very admirable suggestion. (The jury left the courtroom.)

(Recess)

THE COURT: You may proceed.

BY MR. LANDMAN:

Q. Doctor, I won't go through all these animal studies with you. I just want to ask you one question.

In one of these studies, the one by Dr. William Rone, who is at New York University School of Medicine, what

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they did with the animals is, am I correct, that they gave them 12 months of intratracheal injections --

A. Yes, they --

Q. I will show it to you. -- injections of chrysotile asbestos and they found that there was an increase in the number of alveolar macrophages and neutrophils, accompanied by fibrosis. Is that right? I will show it to you (handing to the witness). What I am really interested in is whether or not what they did is gave these animals these 12 months of intratracheal injections.

A. OK. Go ahead.

Q. Is that what they did?

A. Well, they didn't call it fibrosis. They call it fibrosing alveolitis, which means there was active inflammation of the lung, and which was producing scarring.

Q. Can you tell us what they mean by intratracheal injections?

A. Oh, this is where the asbestos is injected to the windpipe.

Q. That is what trachea is?

A. Yes.

Q. Does it say how much they are injecting into the windpipe of the animals?

A. No. This is not the original study. This is a summary of the study.

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Q. Does it say what the animal is?

A. A sheep.

Q. Doctor, pleural scarring itself is not a disease, is that right?

A. It is a disease.

Q. But it has no effect on the body in itself, just pleural scarring?

A. That is not true.

Q. What effect does it have on a person?

A. Accumulation of scars, if sufficient in the pleura, can cause respiratory symptoms and can interfere with pulmonary function. It is very limited in extent that it won't do it, but as it increases it will do that.

Q. And it means you sometimes get shorter breath, is that right?

A. That's probably the cardinal symptom.

Q. In 1990, when your colleague saw Mr. Buckley at the request of Mr. Goetsch -- your colleague's name is Robin Herbert, Dr. Herbert?

A. Correct.

Q. She works with you?

A. Correct.

Q. And you saw that she also wrote a wrote to Mr. Goetsch in this case, is that right?

A. That's correct.

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Q. What she found is that he was able to walk 15 to 20 miles a week and walk up seven flights of stairs with no difficulty. Is that right?

A. That's correct.

Q. When, by the way, did Mr. Buckley tell you he first received a respirator?

A. In either late '87, or, I believe it was, 1988.

Q. I believe your report says -- take a look. You can refer to your report, Doctor, whenever you need to.

A. OK.

Q. Page 2, the second paragraph: Beginning early 1988 and continuing, Mr. Buckley was given a respirator and some training. Is that right?

A. That's right.

Q. So he told you that when he got his respirator in early 1988?

A. I believe so.

Q. Do you know when?

A. No.

Q. Would it change your-opinion at all in this case if you knew he actually had gotten a respirator in 1987

in terms of the amount of exposure he would have had?

A. It depends when in 1987. December or November it really doesn't affect much the total quantity of exposure.

Q. But before that it could change your opinion?

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A. It is a relative amount. You know, in my view he had two and a half to three years of quite significant exposure. If it is a few months less, then it would be that much less exposure and that much less risk, but the basic increase in risk would still be retained.

Q. By the way, your whole opinion on that in terms of exposure again is from Mr. Buckley?

A. It's, again, what happened at the job came from him to me.

By the way, Doctor, you didn't note this in your report four years later, anything about it, but your colleague noted that Mr. Buckley back in 1990 had high cholesterol. Is that right?

A. That's correct.

Q. And in fact told him that he should follow up with his physician?

A. That's correct.

Q. And high cholesterol can cause heart disease?

A. That's correct.

Q. And heart disease is still the number-one cause of death in this country, is that right?

A. That's correct.

Q. And heart disease is related to smoking in part.

A. Correct.

Q. And also having an elevated cholesterol?

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A. What is the question?

Q. That heart disease is related to elevated cholesterol.

A. That's correct.

Q. So that Mr. Buckley in 1990 had two high-risk factors for heart disease: smoking and cholesterol?

A. He had a history of smoking --

Q. No, in 1990 he was still smoking.

A. That's correct.

Q. And how many people die each year in this country from heart disease?

A. I don't know, actually.

But when you saw him in 1994, you apparently didn't even ask him did he ever follow 'up with his physician about the cholesterol?

A. I don't recall.

Q. Do you have any notes of that?

A. No, I don't.

Q. You brought your whole file with you, right?

A. That's true.

Q. And there is nothing in your report you would agree about that?

A. That's correct.

Q. And you would agree that Dr. Herbert did tell him to follow up with his personal physician about that?

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A. I believe so. Let me check.

Q. Take a look at laboratory tests, and the next-to-the-last page.

A. Correct.

Q. And Dr. Herbert stated, "I have advised Mr. Buckley to follow up with his personal physician on all these findings." Is that correct?

A. Correct.

Q. And the findings that they are talking about were that there was an elevation of the cholesterol level to 211 and of the triglyceride level to 470, is that right?

A. Correct.

Q. And you are seeing him as your patient in 1994 and you never bothered to make any notation about that, did you? Yes or no.

A. Yes, that's correct.

THE COURT: Yes, you did not, is that correct?

THE WITNESS: I was seeing him in relation to asbestos-related disease. I did not address the issue of triglycerides or cholesterol.

Q. So, in other words, if I come to you, Doctor, as your patient, and I am coming in, and I say, "Gee, I have been exposed to radon and I am really worried about that, and I am a walking time bomb for heart disease," you are not going to tell me about it?

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A. Well, no. If you come to me with specific questions about your occupational exposure, I am going to give you advice about that.

Q. And that's all?

A. I may or may not give you advice on other things. I don't consider it, what the interchange is, for me to review all the health problems that the person has.

Q. Because that is not the kind of medicine that you practice, is that right?

A. I am a specialist in occupational medicine. When someone comes to me with the issue of what is my exposure, it is what is my health risk.

Q. You talked about risk with respect to Mr. Buckley in this case. What was his risk when you saw him in 1994 of dying of heart disease?

A. I don't know.

Q. Doctor, between 1994, when you saw Mr. Brown, and 1994 when you saw Mr. Buckley, did Mr. Goetsch tell you to put something in your report about medical follow-up?

A. I didn't see Mr. Brown in 1994. And Mr. Goetsch -- No, that isn't the question.

THE COURT: You misspoke.

MR. LANDMAN: I misspoke? I apologize.

Q. Between 1990, when you saw Mr. Brown, and 1994,

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when you saw Mr. Buckley, did Mr. Goetsch tell you at any time during that time, including the day you saw Mr. Buckley or shortly after that, to put something in your report about medical follow-up, that he needed that information?

A. Absolutely not. He never told me what to put in my report.

MR. LANDMAN: Nothing further.

REDIRECT EXAMINATION BY MR. GOETSCH:

Q. Dr. Markowitz, Mr. Landman asked you about the body of opinion regarding whether asbestosis was necessary before asbestos-related lung cancer could develop. Would you tell us, Doctor, whether there is any body of opinion regarding whether asbestosis is a necessary prerequisite to asbestos-related lung cancer?

A. Well, there is certainly an opinion that asbestosis is not required, to consider it a subsequent lung cancer as being asbestos related or not. It is more often considered to be an unsettled question, that is to say, a hypothesis that you need that scarring to elevate the risk of asbestos. But the fact of the matter is, dozens of studies have shown that asbestos as asbestos is what increases the risk of lung cancer. We know this from studies of groups of workers exposed to asbestos even after you account for cigarette smoking that they have an

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increased risk of lung cancer due to asbestos. Some people believe that that excess risk of lung cancer is limited to the group of asbestos workers who also have the scarring. But there is very little scientific data, studies, that prove that hypothesis.

So that I maintain, we know asbestos causes lung cancer, but we don't know and we can't state that asbestosis is required for that lung cancer to develop and be ascribed to the asbestos.

The problem is, you got asbestos, it causes two effects: scarring and the cancer. The heavier the exposure to asbestos, the more likely you are to get both of those diseases, so that you often see both diseases in the same people.

Q. Doctor, what date did you see Michael Buckley?

A. February 1994.

Q. How many years was that after his initial exposure to asbestos at Grand Central?

A. Nine years.

Q. At that point in time, nine years after his initial exposure, did you expect to find any evidence of pleural thickening in his lung on x-ray exam?

A. No, I didn't. I expected to find no evidence of asbestos-related scarring or cancer.

(continued on next page)

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BY MR. GOETSCH:

Q. Why is that?

A. Because of the latency period. That is to say, we know from many studies, you begin exposure to asbestos a one age and you don't see any of the effects until 10 years after that.

In the old, old days when there was very heavy exposure, some people saw some between five and ten years but more recently the increased risk would begin pretty much. at ten years with very few exceptions.

Q. why did you recommend that Mr. Buckley undergo periodic medical monitoring from the date of your seeing hiT into the future?

A. For early detection of disease, that is to say, if he develops some scarring that needs to be addressed. As I said yesterday, we have no cure for the scarring, but you can get an influenza shot or pneumonia shot that can prevent some of the effects of that.

I thought that early detection of that scarring was important. I also thought that with the history of quite a bit of exposure during that two-and-a-half years that there was an increased risk of lung cancer and that his risk of lung cancer was elevated in relation to the asbestos exposure and the former history of cigarette smoking and, therefore, regular chest x-rays might pick up a lung cancer

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early enough to be treated.

In addition, there is some GI cancer that is related to asbestos and I thought he should have regular testing

for that, but that is recommended by the American Cancer Society anyway.

Q. Doctor, was Michael Buckley's need for periodic medical monitoring the direct result of his exposure to asbestos at Grand Central Terminal?

A. Yes.

Q. Is the fact that Michael Buckley is a volunteer on the Metro-North fire brigade at Grand Central, does that change your opinion at all?

A. No. I mean, if anything, it would add to his exposure but, frankly, a volunteer firefighter in that capacity is unlikely to have the kind of -- the intensity of exposure that I saw in the New York City firefighters so that I thought the level of exposure there would be a lot less important than working with asbestos as he did day after day for two and a half years being covered with material.

Q. Doctor, do you have those animal studies that Mr. Landman asked you for?

A. He has all those studies.

Q. Doctor, would you take the time to go through those studies and indicate to us any that refer to the

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effect of chrysotile asbestos on biological changes?

A. Sure. I used the animal studies to try to shed some light on what goes on between onset of exposure to

asbestos and clinical development of disease; that is to say, when the disease becomes apparent on the chest x-ray or the person develops systems.

As I said yesterday, we don't biopsy or take pieces of tissue from healthy people who get sick from asbestos because there is no real reason to do it.

The question is, what's happening during that window when the patient feels well but has all of this asbestos in their lung. I look at the animal evidence to shed some light about that recognizing that it is animal evidence and it involves some extrapolation to humans.

This is one of these studies from a group at the National Institute of Environmental Health Sciences which is part of the government.

They took seven-week old rats and exposed them to asbestos for one hour. This was specifically the chrysotile asbestos. Then they sacrificed the animals after a period of time.

Some animals they looked at after two days so they were exposed for one hour a day and then looked at their lungs at two days and some animals they looked at one month. This is a short time period of exposure.

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The one hour of exposure to asbestos was high but it was only one hour.

They found that the macrophages, one of the cell; in the lungs which is central to the body's defense, had increased in volume at the alveoli, at the point where gas exchange occurs, and that they had moved into the interstitial. They moved in between these air sacs where air exchange occurs.

They were greater in number, size and they moved to a different location. They also found that there was an accumulation of fibroblasts of the cells that produce scarring and they concluded that, these acute structural changes are followed by a progressive response manifested by an increased number of interstitial cells, cells in this interstitial space and localized interstitial fibrosis. One hour of exposure showed changes in macrophages and showed a progression to scarring based on that kind of exposure for one hour.

That same group from the National Institute of Environmental Health Sciences did a number of studies along these same lines. They also took a group of animals, this was by inhalation, they put asbestos in the air and had the animals breathe it in, not the intratracheal installation. Here they are exposed the animals seven hours a day, five days a week, some animals for three months and some for 12

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months, and looked at the changes in the lungs.

This group had a longer term exposure than the other but still three to twelve months, less than a year. They found again accumulation of these macrophages,

these cells of defense, and changes in the tissue which they said, "Indicate marked epithelial injury."

The epithelium is the lining cells within the lung. They are saying these macrophages were there and they were producing injury. One of these studies, it is the review by Roggli in his textbook, talks about the mechanisms of injury produced by macrophages. There are several ideas.

One is what are called active oxygen species. These are sort of oxygen related molecules but the kind of oxygen changed molecules that are damaged are produced by these macrophages and cause tissue damages.

We know that the macrophages, some of which are smaller than the asbestos fibers, they try to engulf the fiber, they are unable to and some of those macrophages die and release enzymes or chemicals that do local tissue damage.

There are a whole list of different enzymes which can be measured directly. We also know that those macrophages produce growth factors, that is to say, these are chemicals that encourage other cells to grow and to produce materials, and that one of those growth factors is

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fibroblast growth factors and they are the cells that produce fiber.

Here we have macrophages in the alveoli and between the air sacs producing a factor or a chemical, protein,

which communicates with fibroblasts, the cells, and tells them to produce collagens, produce scar tissue.

That spectrum of effect is seen within days to months of the exposure to the asbestos by the animals. These articles basically in great detail look at these issues.

Q. Doctor, do those animal study articles that you referred to support your opinion regarding the presence of biological changes in Michael Buckley's lungs?

MR. LANDMAN: Objection, leading.

THE COURT: Answer the question.

THE WITNESS: Yes. Just in support of that question, one of these studies actually was looking at people who had been exposed to asbestos and their x-rays showed some of the scarring of the asbestos.

When they put fluid in those people's lungs and then took it out, which is uncomfortable but not intolerable, when that is done, that is called lavage, and they find cells, the macrophages, just like they do in the animal studies.

When they take off the fluid surrounding those

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macrophages they do some of the same things that were seen in the animal studies, specifically, produce those growth factors that encourage the formation of scars.

So we see in humans the same kind of things that we see in animals. That I think supports the view that there are biological changes going on.

Q. Mr. Landman asked you about various diseases that are preventable. Are asbestos-related diseases preventable. Doctor?

A. Yes. As you reduce and eliminate exposure to asbestos you reduce and eliminate the risk of those diseases.

Q. Do you consider a level of smoking cigarettes of less than one per day to be a level equivalent to not smoking?

A. Virtually. I don't think a cigarette or less a day is a major hazard. I think it is trivial. I can't say it is a zero risk but in the scale of things we usually look at people who have a pack or two packs a day. Less than one cigarette a day is not really meaningful.

Q. Does smoking of less than one cigarette a day have any significant effect on the plaintiff in this case, Michael Buckley, as far as -- from your point of view?

A. No. I think it adds trivially to his risk. I encourage people to stop smoking. The problem with smoking

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a cigarette or less a day is some of those people take back -- in terms of one a day, it is very small.

Q. Do you vary your examination and testing and advice because an individual happens to be sent to you by an attorney?

A. No, I don't.

Q. Do you do the same thing when another medical doctor refers a patient to you?

A. I don't vary my advice or assessment based on who sends the patient to me.

Q. Doctor, from your point of view as a specialist in occupational medicine, how significant was Michael Buckley's exposure to asbestos in Grand Central Terminal from 1985 to 1988?

MR. LANDMAN: Objection; calls for speculation.

THE COURT: He can answer the question.

THE WITNESS: Since we don't have measurements in the air, I relate his kind of exposure to the kinds of things I hear from other patients I have who have had a history of exposure to asbestos.

Usually I see people after they develop some disease. That is to say, they have some scarring. Then I ask them about their exposure in the past.

One group that I have seen a fair number of are shipyard workers because this is the largest number of

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workers, Americans, who received asbestos exposure in the shipyards in World War II.

The reason why, in my mind, I compare Mr. Buckley to these shipyard workers is because most of these workers had two or three years of exposure. They didn't have decades of exposure like the insulators or many of the construction trades we know.

Shipyard workers have significant exposure even if they are not working directly with the asbestos. Whether they are electricians or other trades, the asbestos is in the air.

Followup studies done of those workers, 30 or 40 or more percent of those workers show a scarring of the lungs. They have an increased risk of lung cancer of at least two-fold compared to non-shipyard workers and they get mesothelioma.

I view his exposure at a couple of hours working with dry asbestos, airborne, ripping out, direct contact, manipulating the material, as roughly equivalent to the kind of two to three year kind of exposure that some shipyard workers have. I consider it significant. I consider it, that is to say, it

is an issue that raises his risk of disease in a non-trivial way.

Q. Doctor, you were able to compare the extent of Michael Buckley's exposure from '85 to '88 with that of

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other workers that you have encountered and studied during that time period?

A. His kind of exposure to asbestos was, among patients I have seen, common before 1970, however, I can't recall any other group of workers who had this kind of exposure in the mid to late 1980s; that is to say, unprotected, prolonged direct exposure to asbestos where there was visible asbestos in the air and the dust was covering them. I hadn't seen that at all in people working in the 1980s because they view was asbestos exposure was largely controlled. There are laws about this.

MR. LANDMAN: Objection, your Honor. What is he getting into now?

MR. GOETSCH: He is answering the question.

THE COURT: You can make your arguments to the jury.

MR. LANDMAN: Okay.

THE WITNESS: To finish, this was unusually heavy exposure to asbestos, unprotected, for the 1980s.

Q. Doctor, you asked about the effect of respirators on exposure. When a half face respirator is not fit tested, what effect does it have on its ability to protect a worker from asbestos fibers?

A. Well, the ability of the respirator may be compromised. The way to do this is you test people when

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they put the respirators on to make sure it is the right fit, make sure it fits well and does the job. There are protocols of fit testing so that if it isn't fit tested, the respirator may not work as well. It may but it may not.

MR. GOETSCH: Thank you, Doctor.

MR. LANDMAN: Just a few questions, your Honor.

RECROSS-EXAMINATION

BY MR. LANDMAN:

Q. Doctor, you just gave an opinion to Mr. Goetsch about the causal link between asbestosis and lung cancer. We have already talked about who Dr. Churg is?

A. Correct.

Q. You recognize him as someone who -- who is someone who is somewhat of an authority in this field?

A. He certainly has a great deal of experience.

Q. He has followed in his father's footsteps because his father had a great deal of experience in this field as well?

THE COURT: It is not genetic.

MR. LANDMAN: Not genetic.

Q. He started as a small child. At page 281 of his textbook, Occupational Lung Disease, Dr. Churg writes, "Any physician dealing with asbestos-related or putatively-related disease will encounter carcinomas," meaning cancer, "in workers who do not have pathological

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evidence of asbestosis."

A. On pathology.

Q. On x-rays?

A. Pathological evidence.

Q. "The issue is whether such tumors can be related to asbestos exposure. The British take the view that the risk of carcinoma is definitely known to be elevated when asbestosis is present and hence that a worker with asbestosis found clinically or pathologically in a carcinoma should be compensated for his carcinoma whereas a worker without asbestosis should not receive compensation.

"I believe this is a practical and reasonably objective guideline that is consistent with the current scientific evidence."

You disagree with the current scientific evidence; is that right, Doctor?

A. Yes. I disagree with the interpretation. That is what I mean.

THE COURT: You don't disagree with all of that?

THE WITNESS: No, of course not.

Q. You disagree with what Dr. Chung is saying?

A. That's correct.

Q. Doctor, are you familiar with Dr. Roggli?

A. Yes.

Q. Who is he?

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A. He is a pathologist with expertise in asbestos-related disease.

Q. He has also written a textbook on this; is that right?

A. That is correct.

Q. He is from Duke University School of Medicine?

A. That's correct.

Q. He has written, page 182 from his textbook, "Pathology of asbestos-associated diseases," and actually I am not really being fair because it is both Dr. Roggli and Dr. Donald Greenberg. Do you know him?

A. Only his name.

Q. He is a professor of pathology at Baylor College of Medicine in Texas?

A. Correct.

Q. They have written together on page 182: "In summary, the weight of the evidence at this time seems to indicate that in an asbestos worker with carcinoma of the lung who also smokes cigarettes asbestosis must be present clinically or histologically" and clinically means x-rays, is that right?

A. Correct.

Q. Histologically means tissue samples?

A. That is correct.

Q. "Or there should be at least a tissue asbestos

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content within the range of values observed in patients with asbestosis in order to assign a substantial contributing role to asbestos in the causation of the lung cancer. The mere presence of parietal plaques is not sufficient to establish causation. However, the issue of asbestos or asbestosis as the primary cause of

lung cancer among asbestos workers should not be considered to be settled and more studies are needed to resolve this question with certainty." Is that correct?

A. That's correct.

Q. Doctor, do you agree with this?

A. I agree that more studies are needed to resolve the question.

Q. You don't agree.

A. I don't agree with the weight of the evidence. The first sentence really says that the weight of the evidence suggests that either asbestosis or pathologic evidence of asbestos in the lung is required to attribute it.

Pathologic evidence of asbestos in the lung is not the same as scarring. That just means documentation by looking at lung tissue and the number of asbestos fibers there that there was significant exposure. That is what that means.

Q. In this case we don't have that?

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A. We have no tissue, no lung tissue.

Q. We have absolutely nothing?

A. No. We don't have nothing.

Q. Yes, let's take that. Is there any clinical evidence of asbestos exposure on Mr. Buckley, yes or no?

A. Exposure?

Q. Yes. That he has been exposed; any clinical evidence on his body?

A. There is no clinical evidence of disease. He has had a history of exposure.

Q. Is there any clinical evidence of asbestos exposure on his body, any scarring at all?

A. No, but the question doesn't make sense. No.

Q. Dr. Nicholson hasn't written a textbook on asbestos, has he?

THE COURT: Neither have I.

MR. LANDMAN: But you are not testifying, your Honor.

Q. The shipyard workers you are talking about, what study, is that the Harries study?

A. No. There have been a number of studies, but if you look at Selikoff's study of the Groton shipyard published in the mid 1970s, it is one of the larger studies looking at all the trades in the shipyards.

Q. Are you familiar with the Haries study of the

shipyard workers?

A. I have seen it. I don't --

Q. Do you agree with it?

A. I would have to see it.

Q. Are aware of the fact that the shipyard workers there were found to have exposures over a 25-year period?

A. I don't recall the details about that.

Q. Is there asbestos in fiberglass?

A. Asbestos in fiberglass?

Q. Yes.

A. Not my knowledge.

Q. You mentioned something about fiberglass before in redirect examination.

MR. GOETSCH: Fibroblasts?

A. Those are the cells that produce the scarring.

Q. On these animal studies, how big is that week old rat when they give it --

A. It is not a week old.

Q. It said week old --

A. I think it said seven week.

Q. Okay. How big is a seven-week old rat?

A. I don't know how big it is.

Q. Do you know how much of a dose they were giving it?

A. The mass was 13 milligrams per cubic meter.

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Q. What does that --

A. Over one hour.

Q. How much is that?

A. That is a high dose but that doesn't easily translate to fibers per CC.

Q. That is what I am trying to get at. It is a lot more than five fibers per cubic centimeter?

A. It is more but I don't know how high it is.

Q. You just don't know?

A. That is correct.

Q. What was the animal they were giving the asbestos to for seven days a week?

A. That was rats also.

Q. How much asbestos were they giving them?

A. 11.36 milligrams per cubic meter.

Q. How does that convert?

A. That is very similar to the other exposure.

Q. That is a large amount?

A. That is a high level.

Q. They were doing that 49 hours a week?

A. 35 hours a week.

Q. Five days a week?

A. That's correct.

Q. They gave the rats off on the weekends, I guess. Doctor, do you know if Mr. Buckley has gotten any

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followup medical exams at all?

A. I don't.

Q. But you know that back in 1989, Dr. Steven Levin the medical director at your clinic, wrote a letter to Mr. Goetsch saying, gee, send all these 140 people over and we will be happy to do periodic medical exams and we will charge you for it; did you know that?

A. No.

Q. You have never seen that letter?

A. No. What is the question?

Q. Is that Dr. Levin?

A. Yes.

Q. You recognize his signature?

A. Yes.

Q. He is writing a letter to Mr. Goetsch. What is the date?

A. December 13, 1989.

Q. He is saying that your group would be happy to see all of Mr. Goetsch's clients for medical exams; isn't that right?

A. We will be pleased to accommodate your requests for medical exams.

Q. It was Goetsch's request for medical exams?

A. That is right.

Q. In 1989?

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A. That is what it says.

Q. Did Mr. Goetsch tell you that after Mr. Buckley, he had another 139 people with lawsuits?

A. No.

MR. GOETSCH: Objection.

THE COURT: I don't think it is relevant what he told him.

MR. LANDMAN: It is on the issue of if he wants these people to come in for exams because there is a real pecuniary issue here. I will argue it. I think I am through.

THE COURT: Are you through?

MR. GOETSCH: Not quite, your Honor.

THE COURT: You can't blame me for trying.

REDIRECT EXAMINATION

BY MR. GOETSCH:

Q. Dr. Markowitz, why isn't there clinical evidence of asbestos exposure in Michael Buckley at this point in time?

MR. LANDMAN: Objection. It has been asked and answered a million times. We have heard so much about the latency period.

MR. GOETSCH: I am simply addressing what he raised.

THE COURT: All right. You can answer.

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THE WITNESS: Because not enough time has passed from when he began exposure to asbestos in 1985 until the characteristic time when we begin to see on x-ray or symptoms or whatever which as a rule is no less than ten years, with exceptions, a few exceptions.

THE COURT: Don't ask anymore questions to bring out testimony that he said before.

MR. GOETSCH: Just one more on the subject, the, your Honor.

Q. You were asked about the necessity of asbestosis being present before lung cancer develops, Doctor.

My question to you is, why do you take the view that asbestosis is not necessary before asbestos-related lung cancer develops, can develop?

A. Because I give highest priority to the epidemiologic studies, to the studies of groups of workers who have been exposed to asbestos in a variety of settings over the years.

Those studies show an increased risk of lung cancer as a result of exposure to asbestos, with and without cigarette smoking. That is the most solid piece of evidence we have in the spectrum of evidence.

Now, there is the opinion, and the pathologists express it mainly, Dr. Churg and others, but others do as well, that that excess risk is limited to the group of

workers who show the scarring of the lungs. Not all the workers develop scarring of the lungs. So that they say that the excess lung cancer is limited to that group.

My view is that is a hypothesis, that is an assertion, that is an opinion. Let's look at the scientific evidence and examine whether that is true or not.

Have there been epidemiologic studies which show that if you divide that group of workers exposed to asbestos in two groups, one with asbestos for scarring and one without, but equal exposure, do you find an excess risk of lung cancer only in the group with the asbestosis.

There are very few studies that address that question. In my view, none that satisfactorily address that question. So in my view that opinion is out there but the underlying data don't support that opinion yet.

I recognize that there are people with a great deal of experience who hold that opinion. To me it is not a pathological question. It is a question to be settled by epidemiology and the studies, the body of studies haven't been done to show that that risk is restricted to the asbestosis group.

Q. Doctor, do you take lung tissue from living patients such as Mike Buckley?

A. Well, pulmonary physicians are ones who work with getting biopsies of the lung. I wouldn't personally, but,

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to my knowledge, pulmonary physicians do not go into people who have healthy who have no complaints, no symptoms, and take biopsies. The patients wouldn't let them and most patients wouldn't try to do that because there is no real rationale, certainly in the context of clinical care.

MR. GOETSCH: Thank you, Doctor.

MR. LANDMAN: Nothing further.

THE COURT: Do we have anymore witnesses for today?

MR. GOETSCH: Your Honor, we could call two relatively short co-employees or we could wait until Monday. It is up to you.

THE COURT: We will take a brief recess.

(The jury leaves the courtroom)

THE COURT: There is something I want to ask him in the presence of the jury.

I am concerned. You said in answer to a question of Mr. Goetsch, that you treat this man who is sent to you by a lawyer exactly as you would treat any other person who came to consult with you.

I don't know if you heard the opening in this case, but he has the most tre-

mendous emotional upsetment. He can't hear the word, he can't hear the word "asbestos" without vomiting, that is a little bit strong, but that kind of thing.

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Did gather that when you were talking to him?

THE WITNESS: Well, I discerned that he was concerned about this and that.

THE COURT: You didn't think it was as bad as he said?

THE WITNESS: He didn't vomit.

THE COURT: No.

THE WITNESS: Let me be specific. He didn't break down crying.

THE COURT: Did he indicate to you that he had a severe emotional upset?

THE WITNESS: He indicated that this was worrying him a fair amount, but severe emotional upset was not something that he talked about with me.

THE COURT: If he were your patient, wouldn't you send him to a psychiatrist, for God's sake, and hold down that worry? Isn't worry a bad thing all and of itself?

THE WITNESS: If he displayed that level of concern to me I might have considered that. I might have said, well, I think you ought to get some counseling about this, but I didn't see it.

THE COURT: I see.

THE WITNESS: So if it were -- sure, if I thought it were severe and disproportionate to the real concern that was -- that should be there.

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THE COURT: Why he didn't ask these questions, I don't know. That would be very valuable testimony. It is too late now.

MR. LANDMAN: Why I didn't ask the questions?

THE COURT: Yes.

MR. LANDMAN: You know why, your Honor? It would have been -- frankly, I didn't know what the answer was going to be, and, number 2, they have the burden of proof in this case, your Honor. They have to prove a severe emotional injury and, your Honor, it is quite clear to me they can't do it without a doctor, and they don't have a doctor.

MR. GOETSCH: That is not true.

MR. LANDMAN: That is why I wasn't going to give them an opportunity to have a doctor end up saying something that they have no evidence of.

THE COURT: That is a very good reason. Thank you very much. Get the jury

EXCERPT OF TRIAL TRANSCRIPT OF FEBRUARY 9, 1995 - TESTIMONY OF WILLIAM J. NICHOLSON

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WILLIAM J. NICHOLSON, called as a witness by the Plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOETSCH:

Q. What is your occupation, Doctor?

A. I am employed at Mount Sinai School of Medicine as a professor in the Department of Community Medicine and I conduct research on occupational environmental health hazards. What college did you attend?

Q. What college did you attend?

A. MIT in Cambridge, Massachusetts and the University of Washington in Seattle, Washington.

Q. Have you ever served in the United States armed forces?

A. Yes. In the United States Air Force between 1952

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and 1955.

Q. What did you do in the Air Force?

A. I conducted research on radiation exposure and its potential effects.

Q. At graduate school what was your subject or major in graduate school?

A. It was related to the fission process, splitting apart of heavy elements. It was purely a physics thesis relating to the process itself.

Q. Did you receive a Ph.D. in physics?

A. Yes, I did.

Q. Did you hold any fellowships in graduate school?

A. Yes. At that time it was the Atomic Energy Commission and I had a university fellowship subsequently.

Q. After receiving your Ph.D. did you pursue any research in the field of physics?

A. Yes. I did so at Columbia University for approximately ten years and some physics -- some experimental work in biophysics as well. I had a minor in physiology and biophysics in graduate school.

Q. At what part of Columbia University did you do your research in?

A. It was at the 115th Street campus or the campus in that area.

Q. Did you have any teaching responsibilities at

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Columbia?

A. Some sessions of beginning physics students where you help them with whatever it was they were doing.

Q. How long did you remain at Columbia?

A. Until 1969.

Q. Where did you go after that?

A. I then went to Mount Sinai.

Q. Have you remained in a professorial position at Mount Sinai from 1969 up to the present time?

A. Yes.

Q. Does Mount Sinai School of Medicine have any division devoted to occupational medicine?

A. Yes. They have a division of environmental and occupational medicine in which I serve.

Q. What does that division do, briefly?

A. It was directed initially by Dr. Irving Selikoff, and because of his interest a great deal of our activity related to asbestos health effects or asbestos exposures.

That has encompassed much of my work over the years. Other agents in the environment are also

studied but there has been predominant activity in the field of asbestos research.

Q. Doctor, what is industrial hygiene or exposure measurement?

A. It is the field in which exposures of either

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individuals or processes are evaluated using measurements of -- appropriate to the agent involved. You are looking to see what might be the degree of exposure to workers, exposure to toxic agents in the environment that would possibly harm workers.

In addition, it involves the science of implementing controls to limit such exposures where deemed proper by installing ventilation equipment or other means of control in the process or activity.

Q. At Mount Sinai have you directed the industrial hygiene studies there?

A. I did so for the measurements that were undertaken of exposures to asbestos encountered by various groups of workers that we studied; primarily, insulation workers.

Q. Have you developed and used any analytical techniques for measurement of pollutants in the workplace?

A. Yes. I was one of the ones that early began using electron microscopic techniques in addition to what were optical microscopic techniques.

With respect to asbestos you are looking at very fine particles. The ones that are harmful are the very small and thin ones because they can get down in your lung.

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To count them, to measure their concentration in the air, one needs a very good optical microscope, but, in addition, that is not sufficient to count all the particles because some are even too fine to be seen. There one can use an electron microscope which is a more complicated analytical instrument to evaluate and to quantitate exposures in both workplace and the ambient air.

Q. Doctor, have you published any scholarly articles in the field of industrial hygiene or exposure measurement?

A. I have published some on occupational exposures. I have published more on exposures in the general environment.

Q. Doctor, briefly, what is epidemiology?

A. It is the science that looks at the disease and its potential cause. You can identify an excess amount of disease in a population by comparing what might be expected in that population with what actually occurs.

If you find there is a great many more people developing a disease, it could be an infectious disease and that is, in fact, where the name came from.

If there is suddenly a rampage of measles or something like that, you have what would then be an epidemic. One could establish that by -- in the case of measles it is not very hard, but in some circumstances you are looking at diseases that are unusual and you wish to identify such diseases in a population.

It may require observation or identification of

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the health status of many individuals. You also want to couple such identification of excess disease, whether it be infectious or exposure-related to exposure to toxic-agents related, and then see what is the source of these other diseases.

So we look at, in the particular aspects that I am engaged in, in exposures to toxic agents and the particular disease that, and its magnitude that might result from measured concentrations in the environment.

Q. Have you conducted epidemiological studies while at Mount Sinai?

A. Yes, I have.

Q. Would you just give us an example of two of the groups of workers that you conducted such studies on?

A. I have participated in the studies of Dr. Selikoff where the mortality of insulation workers was studied and the exposures that they had measured.

I have been engaged in studies of factory populations exposed to asbestos and to other agents, to polychlorinated biphenyls. As these agents were thought to be causing effects, one wanted to look at what was in fact taking place in a large population of workers exposed.

Q. What is risk assessment, Doctor?

A. It is the process of utilizing epidemiological

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data largely in a way that would allow you to make a mathematical -- establish a mathematical relationship between exposures and effect looking at factors such as the concentration, both its intensity and duration of exposure, looking at the time course of the resulting disease.

For example, in many circumstances, particularly with asbestos, the disease is not seen shortly after exposure. It may be seen 20 or 30 years later so you would want to have a measure of what the risk of developing an asbestos-related disease in relationship to the person's age, his exposure and the time since that exposure took place. So it is -- it can be summarized in saying it is the mathematical expression of what the risk is considering all factors that one can take account of.

Q. Have you published articles or monographs in the field of risk assessment?

A. Yes, I have. I have published the criteria document for asbestos for the EPA that went into detail on the risk assessment factors.

I did the risk assessment for the 1986 and 1992 OSHA standard for asbestos where such factors such as exposure and time were taken into account.

Q. Do you serve as an editor on any professional journals?

A. I am an editor, one of the editors of the American Journal of Industrial Medicine, and previously I was also an editor of Environmental Research.

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Q. As a professor of community medicine at Mount Sinai do you hold any administrative position or --

A. I am the responsible administrator for what is called the cancer corps. It is a group of researchers that are undertaking activity relating to cancer risk factors, whatever the activity might be, going from epidemiology to molecular biology.

Q. Do you hold any governmental grants in the field of industrial hygiene or risk assessment?

A. I have a current grant looking at exposures and effects from radon in the home, that seeps into a home from radon producing minerals in the earth.

Q. In the past have you held other governmental grants?

A. Yes.

Q. Doctor, are you familiar with a mineral substance known as asbestos?

A. Yes.

Q. Have you studied asbestos in the context of your research and writing as a risk assessor?

A. Yes.

Q. Have you published any journals regarding the effect of asbestos in the workplace on human health?

A. I have probably produced at least a dozen such

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articles and I referred to government publications that I have written.

It goes not only from workplace air but to general environmental concentrations in the air and also the risk of asbestos in drinking water. There was a concern for that at one time but, fortunately, it was not -- the results were not a great hazard in comparison to air concentrations that we were encountering.

Q. Doctor, as far as the size of airborne asbestos fibers are concerned, can you compare them to a human hair?

A. Yes. The asbestos fibers tend to be more than 100 times thinner than a human hair. A human hair -- you know, the fibers in order to even be inhaled would have to be that much thinner than human hair otherwise they impact on your upper respiratory tract.

Their length often is maybe a 20th or a 10th smaller than the diameter of a hair. So you are looking at fibers that are extremely fine and are broken apart from larger visible fiber bundles that often might be incorporated into asbestos products such as thermal insulation, but it is the ones that are not seen by the naked eye, some not even seen by an optical microscope that are of the greatest concern with respect to health effects.

Q. You mentioned OSHA before. What is OSHA?

A. It is the Occupational Safety and Health

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Administration.

Q. Would you explain your involvement with OSHA as far as the airborne asbestos health risk is concerned?

A. I have consulted with OSHA over the years on asbestos health effects. In 1986 they felt that it would be possible to reduce the -- require a reduction in the concentrations that workers were allowed to be exposed to in the workplace, there being no procedures and engineering technology that would allow such a reduction to take place.

They asked that I develop estimates of the different diseases that might develop from exposures to asbestos at different concentrations and use such calculations of mortality risk over time to support a reduction in the standard to one-tenth of what it had been in previous years. That standard was promulgated in, I believe, June of 1986.

Q. What use did OSHA make of your analysis?

A. It served as the basis -- it was their strongest argument that, and the strongest justification, for the reduction.

They said if you allow the current standard to continue, workers could be legally exposed at a level at which there would be roughly 5 or 6 percent expected to die of asbestos disease working at a

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legal standard. That was deemed totally unacceptable and they then required it to be reduced by a factor of 10 but stated that even then there was still a substantial risk, nearly a 1 percent risk, of death, and indicated that all measures should be taken to reduce workplace exposures even lower than that allowed.

They felt that it could not be universally applied without a great cost and they had to take into account not only the hazard but they had to take into account the feasibility of applying a standard.

That is what was limiting their setting a standard at that time. They have subsequently reduced it even further, just recently.

Q. You mentioned the EPA. What is the EPA?

A. Environmental Protection Agency.

Q. What use did the EPA make of your risk analysis?

A. They had -- they were required by the Clean Air Act to produce a health effects criteria document looking at what the hazards were from, in this case, asbestos. It was deemed a hazardous pollutant, and they used that to again indicate what would be areas of activity that they might undertake to reduce exposures to people or the exposures occurring in the environment.

Q. What is the World Health Organization?

A. It is an organization that produces documents on health effects and focuses on health problems throughout the world.

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Much of their focus is on developing countries where they assess countries to control disease patterns but they also have concerns for exposures in the workplace throughout the world.

Q. Have you done any work with the World Health Organization regarding asbestos?

A. I have certainly consulted with them and participated in conferences that they have held.

Q. Have you written any criteria regarding exposures to asbestos?

A. Let me look. I forget for the moment. I will look at my CV. I have written in journals that they have been, I don't know, supporting. But I don't recall --

Q. Okay. That is --

A. A criteria document at the moment.

Q. Doctor, over the course of your career how many patients have you examined regarding exposure to asbestos?

A. I don't examine patients other than to interview them with respect to their exposures.

Q. That is what I meant.

A. That would be probably 1,000 or more. We have conducted extensive examinations of asbestos exposure to workers. It was a study of 2900 insulators that Selikoff directed ten years ago and I participated in and would have been involved in eliciting

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information on their work activities, factory workers and many others, so it is in excess of 1,000 to my belief.

Q. Doctor, have you ever been qualified as an expert witness regarding the effects of asbestos exposure in the workplace on the health of workers?

A. Yes.

Q. Within the past few years how many times have you testified at asbestos-related trials?

A. In probably the last five years, approximately 15.

Q. Have any attorneys who represent asbestos defendants ever referred cases to you for your review and evaluation?

A. Generally, none. I have provided information on exposures.

THE COURT: I have to tell you about our tribal customs here. When a question is asked, you answer that question and don't make any explanations. If he wants an explanation, he will ask for it.

Q. The question was simply whether you -- any attorneys representing asbestos defendants had ever referred cases to you for review or evaluation.

THE COURT: That question can be answered either yes or no.

THE WITNESS: They probably have.

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THE COURT: Yes or no?

THE WITNESS: I don't remember.

THE COURT: I apologize.

THE WITNESS: It has been a small aspect of my activities so I don't remember such a case for the moment but I get a lot of calls from such people.

Q. Prior to this case, Doctor, had you ever testified on behalf of a patient that my firm was representing?

A. No.

Q. Prior to this case, have we ever met before?

A. No.

Q. What is your professional fee that you charge for the time you spend testifying in a trial?

A. In a court setting or a deposition it is $250 an hour.

Q. Doctor, are there any diseases associated with exposure to asbestos fibers?

A. Yes.

Q. Broadly speaking, what are the categories of those diseases?

A. There are two classes of diseases. One is a scarring of the lungs produced by the fibers that are, enter the lung and impinge and remain there. It is called asbestosis.

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It just produces a scarring that ultimately makes breathing more difficult for the individual involved. It can also produce scarring of the lining of the lung.

The second class of diseases are various malignancies that are produced by asbestos exposure including lung cancer, mesothelioma which is a cancer of the lining

of the lung and it is very rare in the absence of asbestos exposure in the general population but it is a lining that encases the lung that can become cancerous and is commonly seen in asbestos-exposed groups.

Asbestos also produces gastrointestinal cancer, cancer of the esophagus, stomach and colon. It can produce kidney cancer. There is some uncertainty that asbestos exposure plays a role there.

It is a carcinogen that is active in many sites in the human body.

Q. Do you have any expertise regarding what the effect of varying amounts of asbestos exposure has on the development of asbestos-related diseases?

A. I believe I do, yes.

Q. Doctor, is there a relationship between the amount of a person's asbestos exposure and the development of asbestos-related disease?

A. Yes, there, indeed, is.

Q. Has there ever been an established threshold of exposure for asbestos-related disease?

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A. There are no data that would establish a threshold for the asbestos-related cancers. The scarring occurs at low exposures but one may not see manifestations of it in a human respiratory system in that the changes in any breathing parameter evaluated would be

extremely small and may not exist at very low concentrations but with the cancers which are the dominant concern from asbestos exposures, there are no known threshold to my judgment -- no data establishing a threshold.

Q. Doctor, are you familiar with an asbestos disease by the name of mesothelioma?

A. That is the name of the cancer that produces -- that is produced -- that evolves from the lining of the lung and is produced by asbestos.

Q. Is there any scientifically known cause of mesothelioma?

A. Asbestos exposure.

Q. What about cigarette smoking, does that play any part in mesothelioma?

A. It has not been shown to be related to mesothelioma.

Q. What is the latency period for mesothelioma?

A. That is a very long period, between first exposure and development of disease.

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Most cancers occur 20 or more years from when exposure occurs. Some have occurred as early as ten years but the chance of that happening, even from heavy exposures, is extremely low.

The cancer is one where most cases, indeed, usually occur 30 or more years from exposure. It is a continuously rising risk according to time from the asbestos exposure.

Q. When a worker's exposure to asbestos stops, what happens to the risk of developing mesothelioma?

A. It continues to rise. In the absence of additional exposure, if there were additional exposure, it would rise a bit faster.

The disease in its total magnitude at any point in time depends upon the magnitude of the exposure but it is one in which the risk continues for 50 or more years from when exposure -- continues to rise for at least 50 years from when exposure began.

Q. Are there any scientific case studies regarding workers who have developed mesothelioma from exposure to asbestos in work places?

A. Yes. There are many studies evaluating the risk. There are the studies of Dr. Irving Selikoff on insulation workers, of various groups on workers exposed in different factory settings, in mining and milling.

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There is probably half a dozen or more studies in which one could have good quantification of the risk with time. There are many more studies in which the fact of disease occurs but the relationship with exposure and time has not been evaluated. It is just looking at a population and see the deaths that have occurred in that population.

One can in roughly half a dozen studies obtain what would be quantitative risk assessments for mesothelioma in relationship to exposure.

Q. Are there any clinical studies of workers developing mesothelioma from regular workplace exposure of less than three years?

A. Oh, yes. There is a study of Dr. Selikoff of a factory in Paterson, New Jersey in which the average duration of employment was about a year-and-a-half and roughly five percent of the people in that factory later developed mesothelioma and, I believe, five family members also did who were exposed by virtue of the dust brought home on the clothes by the workers, the exposure to the family member in the home either from dust dispersed in the home or, in the case of the wife, from shaking out the clothes and washing them, perhaps.

Q. Doctor, as far as you know, is there anything such as a safe level for asbestos exposure with regard to mesothelioma?

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A. I do not know of one. I do not believe there is one.

Q. Doctor, is asbestos exposure also associated with the development of lung cancer?

A. Yes, indeed, it is.

Q. What effect does asbestos exposure have on lung cancer?

A. Its effect is to multiply what the underlying risk of lung cancer would be in the absence of exposure.

That multiplicative effect begins about ten years after the exposure occurred. As the exposure continues the magnitude of the multiplier increases but the risk of lung cancer is proportional to the asbestos exposure up to a time ten years previous.

This multiplying risk is one that continues for decades thereafter. In other words, even if the exposure stops, the person's risk of lung cancer will be increased by a factor proportional to the exposure and that proportional increase continues for at least three to four decades.

Q. Does cigarette smoking also cause lung cancer, Doctor?

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A. Yes, indeed it does.

Q. Have there been any studies regarding the combined effect of cigarette smoking and asbestos exposure?

A. Yes. They have shown that this multiplicative effect applies to the underlying risk of lung cancer that one would have. The risk of a cigarette smoker is multiplied by asbestos exposure. Asbestos exposure acts synergistically, they act together, in a multiplicative way, such that the combined risk is much greater than the separate risk from either agent alone. What the asbestos is doing is multiplying that cigarette smoking risk.

Q. Dr. Nicholson, what is asbestosis?

A. That is a spectrum of --

MR. LANDMAN: Objection, your Honor. I think this is cumulative and I don't think there is much dispute about what asbestosis is. I mean, Dr. Markowitz talked about it this morning. I don't know how many times we need to hear it.

MR. GOETSCH: I can move on, your Honor.

Q. Is there any known cause of asbestosis other than exposure to asbestos fibers, Doctor?

A. By definition there would not be, but one can have scarring of the lungs from other agents, and they are likely to give different appearances, but

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that is certainly a possibility. Usually, for example, one distinguishes readily between silica-induced fibrosis and asbestos-induced fibrosis. There are characteristic patterns that are usually well elucidated, particularly with exposure information, by radiologists.

Q. Doctor, is it necessary to have asbestosis in order to develop mesothelioma?

A. No, it is not. Not to a clinical degree. I mean, one can have mesothelioma with no clinical evidence of asbestosis.

Q. Doctor, are asbestos-related diseases preventable at all?

A. Yes. You prevent the exposure, either by controlling the release of asbestos in the workplace with exhaust devices or, if that is not possible, to have respiratory protection that would, to a very large extent, prevent inhalation of the fibers that might be released.

Q. Doctor, did you interview Michael Buckley at Mount Sinai Environmental and Occupational Hazard Clinic?

A. Yes, I did, sometime in February, I believe.

Q. Would you give us the date of your interview? If you need to refer to your report, you may.

A. It was February 4 of this year -- I am sorry, of 1994.

Q. Was he also examined by Dr. Markowitz at that

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time?

A. Yes. We did it jointly.

Q. Did Dr. Markowitz write a report regarding Michael Buckley?

A. Yes.

Q. Have you read that report?

A. Yes.

Q. Is that report of the type reasonably relied on by experts in your field?

A. Yes.

Q. Have you so relied on it?

A. Yes. We are both, in fact, writing about the same thing, so it was very reliable.

Q. Did you take an occupational history from Mr. Buckley?

A. Yes.

Q. Would you tell us what occupational history you obtained?

A. We obtained his work history from the time he was in high school and the work that he did there, and then, shortly thereafter, his work with the railroad industry. I think he was first with the -- I will have to look at it -- with Conrail, and then he went to Metro-North in 1985. We investigated whether there were any asbestos exposure in the different activities that he had. He worked as a plumber

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until roughly the age of 27. There may have been some asbestos exposure, but it would have been very low in those years, as he indicated to us when he worked with locomotives, which did not involve insulation material, but he certainly obtained substantial asbestos exposure in Metro-North beginning in 1985.

Q. Would you tell us what the details of that occupational history were?

A. He was asked to work on steam tunnels and other -- I am sorry -- steam pipes in tunnels and other pipes as well, I believe, in the area about and underneath the tracks of Grand Central Terminal. There's about four or five major tunnels there. It involved replacing pipes and valves, but prior to his being able to do that, he would have to remove all the old insulation, which took a considerable amount of time because in some cases it had wire mesh about the pipes. And this was done by hammer and saw and ax and other methods of dislodging the material from the pipes. He estimated that, on average, he would spend about one hour a day doing such removal activity, and the rest of the time he would still be exposed to asbestos which would still be in place, as debris, some of it would be there as debris thereafter, but his work over the majority of the day was that of a pipe fitter replacing piping

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and valves. He would also have to sweep up the debris, again a dusty activity.

Q. Doctor, did you review any documents from Metro-North regarding the presence of asbestos in Grand Central and the type of asbestos present in Grand Central during that time?

A. There was a document produced for Metro-North, by a company called Environmental Health Protection Consultants, that in 1986 investigated the presence of asbestos in various areas of Grand Central Station.

They reported in these tunnels approximately 150 samples that were taken. I believe one of them was a sample that did not contain asbestos. The others did, and it contained largely an asbestos mineral called Chrysotile. Some contained a mixture of Chrysotile and another asbestos mineral called Amosite. There are, in fact, five different fibrous minerals that -- six different asbestos minerals that fall within the classification of asbestos, and they have different uses, but the ones that are most commonly used are, firstly, Chrysotile and then Amosite, which is what was found in these samples by this organization.

Q. Was that result in that document that you just mentioned consistent with the occupational history that you took from Michael Buckley?

A. Yes. He was describing in his work quite powdery

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material that was released by his hammering. The most common material used for thermal insulation has one of two white powdery materials into which are placed about 10 to 15 percent asbestos fibers for reinforcing, both for insulation, both the fibers and either the calcium silica or magnesium that would have been used as the bulk material, and to withstand temperatures that were produced by the steam within the pipes so insulated.

But when removed from the pipes in the manner described by Mr. Buckley, these little fibers get dispersed into the air, and the concentrations are ex-

tremely high in that activity and extremely dangerous for long-term or even short-term inhalation.

Q. Doctor, have you conducted any personal inspections of the Grand Central Terminal in regards to asbestos conditions?

A. Yes. Mr. Buckley showed us the areas in which he was working in I believe it was July of 1994, but in the summertime. The areas in which he worked were now covered and looked very nice and neat. But he would show us a pipe and said, "This was one of the pipes that I had to knock the stuff off from here to there." And the spaces in which this was being done were relatively confined often and would produce a concentration that would last. They were not open where the dust could drift away or be blown away by outside air, as would be the case if one were

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doing such work in a tall, open skyscraper building under construction.

Q. Doctor, how did the condition of the steam tunnel pipe insulation in July of '94 compare with your understanding of their condition in '85 to '88?

MR. LANDMAN: Objection. He wasn't there in 1985 to 1988; foundation.

MR. GOETSCH: I asked him for his understanding based on the history he took from Michael Buckley and the Metro-North report that he reviewed.

THE COURT: I will allow it.

A. The description that Mr. Buckley told us of the conditions in his work activity in 1985 was substantially different. Instead of the pipe covering being nice and covered, it was often broken, there would be debris. But even if it were enclosed, if he had to take it off by the means that he did, it is his removal activities that are producing a great deal of dust. There would be debris that he would stir up and add to his exposure in '85 and subsequent periods of time.

Q. Doctor, does the type of asbestos that a worker is exposed to have any significant effect on his future risk of developing asbestos-related diseases?

A. It does in some cases. There is one type of asbestos that would appear to have a greater propensity

for producing mesothelioma, but that is a type, it is named Crocidolite, that is rarely used. It is used often for insulation in acidic conditions. They used to put it in battery boxes. With respect to the types of asbestoses that are used in thermal installation, either Amosite or Chrysotile, the data that exist indicate that Chrysotile and Amosite are equally potent in developing mesothelioma and equally potent in developing lung cancer.

Q. Doctor, what was the type of asbestos at Grand Central Terminal?

A. Largely Chrysotile but a substantial amount of Amosite was also present.

Q. Does the fact that it was largely Chrysotile asbestos have any effect on your opinion regarding the degree of his risk?

A. No, it does not. The data obtained from the analysis of the mortality experience of insulation work clearly shows that the period when they were exposed largely to Chrysotile has created the same risk as the period when they were exposed to a mixture of Amosite and Chrysotile, that being a period when Amosite was introduced, which was the late 1930s. The risk from exposure in the two separate periods would appear to be the same, indicating the Chrysotile and Amosite had similar characteristics, similar potencies of carcinogenicity.

Q. Doctor, have you published any study of the

effect of Chrysotile asbestos versus the effect of Amosite asbestos?

A. Yes, I have. I have produced an analysis with respect to workers exposed in different periods of time when the two mixes of the two fibers were present.

Q. What is the most recent study that you published regarding the difference between Chrysotile and Amosite?

A. There is one that is in print that was published late last year, September-October perhaps. I made a presentation extending the analysis at an international meeting held in Milan -- in a town near Milan, in

October of 1994, and the proceedings of that meeting will be published sometime this year.

Q. Doctor, does OSHA distinguish between exposure to Chrysotile versus exposure to Amosite asbestos?

A. They do not. They consider them equally potent. Very explicitly so. I mean, it isn't an omission. They state so.

Q. Doctor, did you prepare a written report regarding your findings and conclusions concerning Michael Buckley's exposure?

A. Yes.

Q. Did you determine the concentration of asbestos fibers generated by the removal of asbestos pipe installation by Mike Buckley during that '85 to

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'88 period in Grand Central Terminal?

A. Yes. Based upon different reports of concentrations, including our own measurements in that area, one can estimate average concentrations for the full day. You have just enormously high concentrations during removal, especially by the means as described by Mr. Buckley. And it was my view that his one-hour exposure produced an average exposure over a day in excess of the typical exposure of an insulator who is largely applying new insulation material. That can release dust. At some time the material is kind of sawed, but mostly they are working with wet material such as cement which is now being applied over the

material. And based upon after comparison of the mortality of these insulators, who work steadily for typically 25 to 30 years, compared to Mr. Buckley, having, in my view, the same exposure but only for three years, I could estimate what would be his risk of developing an asbestos-related cancer as a fraction of the time that he spent in such work compared to the period that the insulators, under studies that we have conducted in Mount Sinai, spent in their lifetime profession.

Q. Did you determine the peak concentrations of his exposure and the average concentration?

A. The removal work tends to produce concentrations

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in the tens of fibers per milliliter up to 1,000 fibers or more per milliliter, depending upon the activity that is done. Let me just explain the measurements, because you put them in perspective.

The concentrations are measured by counting fibers of a specified size that are collected on a filter paper using an optical microscope. They are measured in terms of fibers per milliliter. A milliliter is about a thimbleful of air. So that is what we are looking at.

The average concentrations measured in a British study with about 30 or 40 measurements, or even, indeed, 100 -- I am sorry -- 200 measurements, had average concentrations exceeding 100 fibers per milliliter during this work activity. The current asbestos standard in the United States today is one-

tenth of a fiber per milliliter. So we are looking at something that is just egregiously high.

The long-time exposure of insulators were between 10 and 15 fibers per milliliter in land-based work, and perhaps 15 to 20 in shipboard work. So we are looking, then, at concentrations in one hour that can give you the same exposure as an insulator gets over a day, that he works eight hours, ten fibers per milliliter, and Mr. Buckley, one hour and 100 fibers per milliliter. In fact, insulators work only half time using asbestos, as their average concentrations are even lower than 10 to 15.

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It was on that basis that I estimated that Mr. Buckley's one-hour exposure was similar to the exposure of insulators in earlier years, in the '50s and '60s and '70s.

Q. Doctor, in the field of exposure measurement and risk assessment, how much risk is considered to be a significant risk?

Mr. LANDMAN Objection, your Honor.

MR. GOETSCH: Your Honor, he is an expert in this field and I am asking him to define.

MR. LANDMAN: What does "significant" mean?

THE COURT: First have him define what "significant" is.

Q. Doctor, what is the significant increased risk in the field of risk assessment?

A. That's been debated, but there is a discussion of that in a standard that OSHA promulgated with respect to benzine that was taken, I believe, to the Supreme Court, but this might have been a discussion of a District Court, in which they were judges, now, who were attempting to answer that question. And they stated, and it is published in the --

MR. LANDMAN: I object if the witness is basically telling us what is in some court opinion. I don't know how that can possibly be useful information in terms of what this expert is providing.

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THE COURT: Yes. Counsel wants to know what your definition of significant risk is.

THE WITNESS: Well, I think you should eliminate risks at, well, certainly 1 in 1,000 is a highly significant risk. 1 in 10,000 is something that I would take effort to reduce, and even lower levels. But risks -- I wouldn't want to be part of a group of 1,000, one of whom was going to have a very high likelihood to die from a particular exposure. I wouldn't even want to be part of a group of 10,000. And you are down to 1 in a million: there is not much one can do about such risks, but --

THE COURT: Why don't you define which point in this range this plaintiff comes? Is that what you want to know?

MR. GOETSCH: That is what I am leading up to, your Honor, yes.

Q. Doctor, had OSHA ever taken a position on how much increased risk is a significant increased risk?

A. It has --

MR. LANDMAN: Objection. What difference does it make how much risk is a significant risk that OSHA may have taken?

MR. GOETSCH: Your Honor, I think it is relevant. We have the OSHA POL standard, for example, which is in evidence and will be part

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of the case.

MR. LANDMAN: That is a different question. I have already stipulated to that. If he is asking again for the third time what the PEL is, we know what it is. We have heard it three times already this afternoon -- the permissible exposure limit. But this question is a different question.

MR. GOETSCH: Your Honor, it goes to what the permissible exposure limit is.

THE COURT: He doesn't have to tell us what OSHA is. You can read the OSHA regulation yourself, can't you, to the jury?

MR. GOETSCH: Yes, your Honor. I am just trying to quantify that.

THE COURT: It is what his view is, not what OSHA's view is. It is what his view is.

Mr. GOETSCH: All right.

Doctor, as far as you are concerned, as an expert in the field of risk assessment, what amount of increased risk do you consider to be significant?

MR. LANDMAN: Objection. I think it has been asked and answered. I thought he said 1 in 10,000 he would think would be highly significant. 1 in a million he said wouldn't be.

THE COURT: What I want to know is: What risk do you think this man is suffering from, what

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percentage risk? Can you tell with reasonable medical certainty, as we say, can you tell what percentage risk this man is suffering from?

Q. Doctor, do you have an opinion as to the amount of increased risk of dying from cancer that Mike Buckley has incurred as a result of his exposure to asbestos in the Grand Central Terminal from 1985 to 1988?

A. I believe it is between 1 in 100 and I in 20.

THE COURT: 1 in 100 persons?

THE WITNESS: That's right. And it's very likely to be above that and it could be as high as 1 in 20.

THE COURT: All right.

Q. Does that risk of dying of cancer include both lung cancer and mesothelioma?

A. Yes, it does. And the other cancers that I mentioned as well.

Q. Will you tell us how you arrived at the degree of risk of between, was it 1 in 20 and --

A. 1 in 100 to 1 in 20. From 1 percent to 5 percent.

Q. All right.

A. That would be my view as his chances of developing a cancer as a result of his asbestos exposure. What I did was look at, if I can get that out, the

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mortality experience of insulation workers who, particularly the group studied who were employed for about 25 years, and in that circumstance roughly 40 percent of their deaths are the result of their exposure to asbestos and about 30 percent are cancer deaths, the other roughly 10 percent being asbestosis, and a death from asbestosis is not something Mr. Buckley has to worry about, although he might develop shortness of breath.

If one takes the various cancers, and, in the case of lung cancer, a typical average smoking habit, some smoking a pack or two a day, but using a one pack a day average, compared to Mr. Buckley who stopped smoking and now is perhaps smoking one cigarette a day, and reducing the underlying risk correspondingly, that is, considering only the insulators who have one-tenth the excess risk that was seen, using that basis without adjustment for the other cancers, then reducing those excess cancers by the ratio of 3 years to 25 years, I developed a number of excess cancers that group might expect to have were the exposure such as Mr. Buckley developed, compared to the number of deaths in the group that occurred. That led to an estimate that, instead of 30 percent of their deaths being the result of asbestos exposure, 2.3 percent would be the result. That is less than the ratio of 3 to 25, which is 12 percent, and that is because of the reduction in the underlying risk of lung cancer

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that asbestos multiplies, considering a smoker, regular, pack a day, compared to Mr. Buckley at most at one cigarette a day. For a while he was not smoking at all. So the median value that I obtained from the calculation was 2.3 percent. The uncertainty of the process certainly would have the range go from 1 percent to 5 percent, which is what I conveyed to Mr. Goetsch in my report to him last March.

Q. Doctor, how does the risk of 1 in 100 compare to a risk of 1 in 1,000?

A. It is ten times greater.

Q. How does the risk of 1 in 20 compare to a risk of 1 in 1,000?

A. It is 50 times greater.

Q. Doctor, do you know of any way that Mr. Buckley's increased risk of dying of cancer from asbestos exposure could have been entirely prevented?

MR. LANDMAN: Objection.

THE COURT: I didn't get the question. Could have been what?

MR. GOETSCH: Could have been entirely prevented, your Honor, was the question.

THE COURT: What does that have to do with anything? Sustained.

Q. Doctor, is Mr. Buckley at any risk of developing pleural plaques or scarring?

A. Yes, he is. Additionally, he could have

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calcification and fibrosis of the lining of the lung, not malignant. He could have fibrosis of the interior of the lung which is involved in the passage of oxygen into the bloodstream. So there could be some shortness of breath resulting from this, and it depends upon both the circumstances and the body's response to the fibers as to the degree of that shortness of breath.

Q. Doctor, during the period of 1985 to 1988, did OSHA have any regulation governing the permissible exposure level of workers who handled asbestos on the job?

A. Yes. The level in 1985 was 2 fibers per milliliter. In June of 1986, they mandated that the permissible exposure limit be two-tenths of a fiber per milliliter. So they reduced it tenfold in that period of time.

Q. Doctor, can a worker incur an increased risk of developing asbestos-related disease even if he is exposed to asbestos fibers below OSHA's permissible exposure limit?

A. Yes, he can. In the 1986 standard it was estimated that if one were to get that permissible exposure limit of two-tenths of a fiber for a working lifetime, there would be between six- and seven-tenths of 1 percent chance of dying of asbestos cancers. So it was not

completely protected, but it was one that was feasible at that time in considering the circumstances in U.S. industry.

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Q. Doctor, are you familiar with a personal air monitoring test?

A. Yes.

Q. Briefly, what are they and how are they conducted?

A. Well, it's a mechanism for obtaining information on the exposure worker. One starts with a little pump, vacuum pump, that draws air through the a cassette holding a filter paper, and there is a little tube going from this set of about that diameter (indicating) with the filter paper in it. This cassette is clipped to one's collar or lapel. The pump is activated, drawing a specified measured quantity of air carrying the asbestos fibers that happen to be present in the breathing zone of the workers. So you are measuring asbestos drawn in where the worker would inhale it. Through this filter paper, one can have the pump operating for half a day or whole day or shorter periods of time, depending upon the circumstances. This is then taken to a laboratory, the filter paper is cleared by a liquid so that the fibers can become visible, and they are counted over a specified area. Then, knowing the volume of air that went through that area, one can get a measure of the concentration of these counted fibers per milliliter of air, which relates to the standard.

Q. Doctor, are you aware of whether there were any

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personal air monitoring test results for Michael Buckley while he was working with asbestos between '85 and 1988?

A. Not for Mr. Michael Buckley, to my recollection, or to my awareness even.

Q. Doctor, do you have an opinion as to whether the amount of airborne asbestos that Mr. Michael Buckley was exposed to from June of '85 to June of '88 was in excess of OSHA's permissible exposure limit?

A. I believe it was far in excess of it.

Q. Does the lack of any personal air monitoring test for Mr. Buckley during that period have any effect on your opinion regarding the harmful amount of asbestos over the OSHA limit that he was exposed to?

A. No, it does not, because I am relying upon measurements of that process or processes even more carefully done than Mr. Buckley described, for my estimate of what his exposure was.

Q. And those exposure that you are referring to, are you referring to measurements taken of insulator workers?

A. Yes. The average exposure insulation work in Great Britain, measured by well over 100 air samples, both area samples and personal samples, was in excess of 100 fibers per milliliter. some personal samples in the United States also exceeded 100 fibers per milliliter in land-based construction, were

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averaging less, but, considering Mr. Buckley's confined spaces, I believe the higher values are more characteristic of what he would be experiencing.

Q. Doctor, what is the effect of a worker wearing a respirator while working with asbestos?

A. It's simply to obtain a measure of what his exposure is. It doesn't interfere with his work at all. In most circumstances you have the pump in his back and a little plastic tubing coming over the shoulder.

Q. Do respirators that asbestos workers use have to be fit tested?

A. I am sorry, did I answer a different question than you asked?

Q. Well, I asked you about respirators.

A. I am sorry, I thought you were talking about --

Q. Personal air test?

A. -- personal air test. Cancel that last comment.

Q. The question referred to respirators, and what I had asked you was, what effect did wearing a respirator have on an asbestos-related exposure?

A. It is a means of preventing some or a great deal of the exposure. There are different types of respirators. One can have a half-face respirator in which there is a rubber-type face piece that in principle provides a

seal between the skin and the respirator. In the respirator itself there is a filter that

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will filter out the asbestos fibers. The filters typically work very well. The face seal doesn't work so well at times and so there can be some leak. With approved respirators -- I am sorry. Could you ask the question again, please? I am sorry. I was sidetracked.

Q. I had asked you about the effect that the respirators have on the amount of exposure on the asbestos workers.

A. Well, on average, the material that was in the air, that is, in the area, the material that has been released by the happenstance activity, if there is a break in the seal between the round edge of this half-face covering, on average they can feel that maybe the activity can rise to -- can, on average, encounter 10 percent of the possible activity. So with the material that is drawn up into the air, one can, with a half-face piece of a well done covering mask, feel that one can remove the dust from 90 percent. If you go to a full-face respirator, it goes higher and finally you can get much more comfortable. It depends upon the full regalia versus a face mask.

Q. Doctor, is there such a thing as a fit testing a respirator?

A. Yes.

Q. What does fit testing a respirator mean?

A. It tends to minimize the degree that a face mask

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will release. You look at it. You look at particularly the face mask with the thumbs. Unfortunately, initial fit testing may not work for very long. You can bump in the workplace, and so there can be activities that release the fit that would be ideal in a respirator. That is particularly the case with these half-face respirators, where there is a fit over the nose and around the mouth. As you get to more complicated, full-cover respirators, the fitting will be better over time.

Q. Doctor, let me ask you about the risks of mesothelioma that Mr. Buckley has in relation to his smoking history of smoking cigarettes'.

A. It is unaffected. The mesothelioma risk is not dependent upon how much an individual smokes, other than that the person may die of lung cancer from cigarette smoking and be shorter in life, and that is over a lifetime.

Q. Doctor, which asbestos-related cancer does Mr. Buckley have a greater risk of, mesothelioma or lung cancer?

A. Mesothelioma, because he has stopped largely the lung cancer, the smoking that he undertook, and a large portion of the lung cancer risk, after about ten years, you would lose approximately 80 to 90 percent of the cigarette smoking risk that he had

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developed as a cigarette smoker. He is now apparently smoking a cigarette a day. That will add to his risk over time, but it is one that is much much smaller than that of a pack a day. The mesothelioma risk is unaffected by either his stopping or starting again, and accounts for roughly 50 percent of his risk.

Q. What accounts for 50 percent of the risk?

A. Mesothelioma.

Q. Doctor, prior to going to Mount Sinai, Mr. Buckley, did he have a history of smoking cigarettes?

A. Yes.

Q. What was the history that was recorded?

A. It was as much as 1 pack a day, often was less, but it ranged from a pack a week to a pack a day, from the time, beginning when he was age 17. I would imagine that it would increase from age 17. He would not start out at a pack a day at age 17, but over time that he was smoking, from roughly 1980 -- since he was 17, to roughly 1991 or '92, he smoked cigarettes. Let's see, he was 30 years old in 1985, so he was born in '55. He would start smoking in the early 1970s.

Q. Doctor, what happens to the risk of developing cigarette smoking when a smoker reduces his smoking to less than one cigarette a day, on average?

A. The risk that would be encountered within a year or two will decrease, the smoking-related risk will decrease over a ten-year period of time to roughly

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20 percent what it would be had it continued with no increased risk, and then there is probably a further reduction after ten years. There is a very substantial risk, relative risk of -- a substantial reduction in the relative risk of cigarette smoking with cessation of exposure. There is not a reduction in relative risk of lung cancer from stopping asbestos exposure. The asbestos fibers are going to be in your lungs and are going to stay there. And the risk from the past exposure to asbestos does remain but that cigarette smoking risk can be partially removed, if not totally removed.

Q. In your opinion, as a risk assessment, does Michael Buckley have a reasonable scientific basis to fear that he will develop asbestos-related cancer in the future?

A. Yes. To the degree that I just gave, between 1 and 5 percent, I believe. It would be his chance of developing, his chances of dying of an asbestos disease.

Q. Can you tell us what amount of that risk is from mesothelioma as opposed to lung cancer in quantitative terms?

MR. LANDMAN: Objection; already answered. He already said it is 50 per cent of the risk.

Q. As far as the lung cancer, what is the quantified amount of that increased risk?

A. That is one cigarette a day. It is between 10 and

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20 percent, closer to 10 percent

Q. Doctor, assuming that --

A. -- of the asbestos-related risk, total.

Q. Doctor, assuming that Mr. Buckley has a statistical future life expectancy of 36 years, does he have a reasonable scientific basis to fear the development of asbestos-related cancer for the rest of that statistical life?

A. Yes.

Q. Doctor, have you reviewed a report by Dr. Balzer regarding Mr. Buckley?

A. Yes.

Q. Is that a report of the type reasonably considered by experts in your field in forming opinions?

A. Well, he was not providing the basis for his exposure. He made a statement that the exposure was nil.

MR. LANDMAN: I move to strike as not responsive, your Honor.

THE COURT: What is that?

MR. LANDMAN: I move to strike that response by the witness as not responsive.

Q. First, let me just ask you, Doctor, whether you considered Mr. Balzer's report or Dr. Balzer's report regarding Michael Buckley.

MR. LANDMAN: First I have moved to strike something.

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I guess the Court needs to rule.

THE COURT: I strike the question.

MR. LANDMAN: And the witness's answer has been struck?

THE COURT: Yes, it has been stricken.

Q. You did consider Dr. Balzer's report as part of the total picture?

A. Yes. I remember reading two of his reports, and I generally remember reports, but I don't have them with me so I can't answer explicitly on a particular sentence.

Q. Are those reports of a type generally relied on by experts in your field, not necessarily the conclusions but just the type of report?

A. I would say no, without having -- because he doesn't provide a direct link to what are explicit descriptions of work activity and his conclusion. He makes assumptions about work activities that, in my view, are totally incorrect with respect to Mr. Buckley's work.

Q. All right.

A. As I read last summer.

Q. And the assumptions that he makes that were incorrect are what?

A. That he was not removing asbestos to the degree that he was. He was talking about pipe cover work and

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working with pipes. That is not the worry. The worry is taking the asbestos off by very aggressive means for an hour before one can work on the pipes. It is the removal of the asbestos as described by Mr. Buckley that indicates this very substantial exposure to asbestos that produces a substantial risk of disease. That was not taken into account in Dr. Balzer's report.

MR. GOETSCH: Thank you. No further questions at this time.

THE COURT: We will take a brief recess. (Recess)

THE COURT: You may proceed.

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CROSS-EXAMINATION BY MR. LANDMAN:

Q. Good afternoon, Doctor.

A. Good afternoon.

Q. Let me give you back your file, but, Doctor, I have kept a couple things out that I am going to ask you about. I will keep them out but I want to give this to you in case you need to refer to it, okay?

A. Okay.

Q. Doctor, you are not a medical doctor; is that correct?

A. That's correct.

Q. You are also not a trained industrial hygienist engineer, are you?

A. I have taken courses but I am not a certified industrial hygienist.

Q. Or a certified industrial hygienist engineer, are you?

A. No.

Q. I notice that the report you prepared, the very first source you referred to in references -- you listed four references; is that right, in your report?

A. Yes.

Q. The very first one is Balzer, J.L.; Cooper, C.; 1968, the work environment of insulating workers; is that right.

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A. I think I referred to two groups that made measurements of insulation worker exposure, one being Balzer and Cooper and the other being Harries.

Q. When you say you referred to, you relied on some of what the Balzer study found?

A. To some degree, but there are far more extensive data available from Harries.

Q. Let's talk about that. The Balzer study studied which group of workers?

A. San Francisco Bay insulators.

Q. They were hired by the union to do that?

A. I don't know where they received the funding. It may state it in the articles but at this point I don't recall whether it was the industry or the union.

Q. It is your recollection they just studied workers in San Francisco?

A. It would be largely there. That is where they were located, in Berkeley, so it was in the convenience, during the work in the Bay Area was evident.

Q. Who is Dr. Balzer?

A. He at the time was a student in industrial hygiene at Berkeley. Clark Cooper was in the faculty in some role, not necessarily industrial hygiene, but he was, I guess, Dr. Balzer's thesis adviser.

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Q. This is the study that Dr. Balzer did before he had even become a Ph.D.; is that right?

A. I believe so.

Q. Dr. Balzer is an industrial hygiene engineer; is that correct?

A. Yes.

Q. Based upon the fact you cited him, you rely on some of his publications to form your opinion?

A. I was trying to be complete with respect to the information that was available.

Q. You weren't trained as an industrial hygienist, you were trained as a nuclear physicist; isn't that right?

A. Largely speaking, yes.

Q. The subject we are speaking of here has nothing to do with nuclear physics, does it?

A. Not at all.

Q. You mentioned that you were in the Air Force from 1952 to 1954?

A. 1955.

Q. Okay. At that time you as a nuclear physicist were studying radiation exposure and the effects on people, is that right?

A. That's correct.

Q. At that time the United States was conducting atmospheric nuclear tests in Nevada with soldiers;

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isn't that right, at the Nevada test site?

A. I don't remember if the soldiers -- what they were doing with soldiers at that point. At some point they certainly had soldiers stationed near the blast. I think they probably did at that time.

Q. Wasn't it from 1951 to 1958 that they conducted the tests and would have the soldiers go out there?

A. Some of the time, yes. I don't know specifically if it happened to be either '55 or '53 which would be the Nevada test site.

Q. What was your role in that experiment?

A. I was making measurements on the radiation that was collected -- radiation exposures that were obtained in the cockpit of planes that flew through the cloud, either that were drones or, in later periods, piloted aircraft.

Q. You have since read articles that said basically those people were guinea pigs, what the effects of radiation were?

THE COURT: Those people were what?

Q. Guinea pigs.

A. Anybody that was actively engaged in the research was likely to be exposed, as was I.

Q. You were in an airplane?

A. No. I was on the ground when they came back.

Q. When they came back from where?

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A. If a plane went through a cloud or nearby and landed we were looking at how much radioactive material collected in the engine or contaminated the surface. I was involved in that.

Q. There were actually infantry soldiers who were actually marched out to close to ground zero; is that correct?

A. I don't know if that was taking place. I don't remember in '55 when I was there and I don't know if it took place two years earlier. At some time that certainly was the case. I just don't remember which series. There were many of them, some of which used people near the center with varying means of protection or not and there is no question that soldiers were marched somewhere near ground zero.

Q. You were apparently making risk assessments with respect -- no, not risk assessments. You were just determining how much radiation was on the airplane when it came back; isn't that right?

A. Yes. I was doing analyses that would indicate what would be the radiation present in aircraft at different times from an explosion based upon measurements made later afterwards but you have other information upon the decay of fission products that would allow you to extrapolate former, earlier in time, to look at

what would be the consequences of a plane flying through a cloud.

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Q. You determined or you agree that radiation is a dose response, has a dose response effect?

A. Yes.

Q. The more you get, the worse it is?

A. Yes.

Q. Do you hold the same position you do with asbestos as you do with radiation?

A. Yes, I do.

Q. So you believe that there is no safe level of exposure to radiation?

A. I don't know if I believed that at the time. I was kind of indoctrinated that that was not the case at that time.

Q. When did you come around to the other side?

A. Probably, in graduate school, when I went to graduate school after that. The kind of dogma was that there was a threshold for radiation that was promulgated in the early 1950s.

Q. What was your rank when you got out of the Air Force?

A. First Lieutenant.

Q. You were an officer?

A. Yes.

Q. When did you go to graduate school?

A. 1955.

Q. That is when you came around to this other side,

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that there is no safe level of exposure?

A. As I looked more into radiation I changed my view.

Q. The first ten articles I think on your resume or CV are all about nuclear physics, not about risk assessment or occupational exposure; isn't that right?

A. Largely they are on physics. There are some on photosynthesis as well.

Q. Doctor, you have now been in this field of risk assessment and occupational exposure for how many years; 1969, right?

A. I went to Sinai in 1969 and initially I was making exposure measurements and it was later that I began to work in relating effects under different circumstances as one would do in risk assessment.

Q. Doctor, how many soldiers from the time of 1952 to 1955 were exposed to ionizing radiation in those tests; thousands, right?

A. I would imagine, yes. I don't know the number. I was in the Air Force and we weren't apprised of all of the details that other services were doing. So that was not part of my experience.

Q. What I am trying to find out is, have you ever written any studies about their exposure and

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their long term health effects?

A. No, because I don't know anything about their exposure.

Q. You haven't spent any time studying that?

A. That is correct.

Q. Have you written any papers saying these people ought to be monitored because they have a higher risk for cancer?

A. The --

Q. Have you, yes or no?

A. I haven't written a paper on that, no.

Q. You have contacts, you say, with OSHA, the federal government. Have you ever done anything to get word out to these soldiers that they ought to be going

to get periodic medicals because they were exposed to radiation which we all know kills people?

A. There is a lot of information that is promulgated.

Q. Have you done that?

A. I haven't done that because I don't know anything about this group that would allow me to make a reasonable statement. I don't know there was a group there. That is what I told you in the beginning.

Q. I am just trying to figure out, you never worked as an insulator?

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A. No.

Q. You never worked as a pipefitter?

A. I put in pipes but I never worked as a pipefitter.

Q. You put in pipes in your house?

A. That's right.

Q. But you did spend a fair amount of your time as a nuclear physicist in the Air Force studying the effects of radiation or the radiation in nuclear bomb tests, didn't you?

A. Yes.

Q. Would you agree with me that you were actually more intimately involved with those soldiers than you

were with any pipefitters that you later studied in terms of your own personal experience?

A. I don't know the exposures or anything about the details of what took place by the soldiers in the bomb tests other than to acknowledge that I certainly read about such individuals being present. I know about the pipefitters.

Q. You said you left nuclear physics for what reason?

A. I was induced to go to Sinai by Dr. Selikoff and work on activities there. I felt that that would be of interest and would be an area where I could see clear benefits directly from the work that I

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would do in relationship to a particular exposure problem, that of asbestos.

Q. You have now, I guess, you have studied benzene; is that right?

A. I have done a little work on benzene.

Q. You studied polyvinyl chloride?

A. Yes.

Q. You studied asbestos?

A. Yes.

Q. Why don't you tell me all the other carcinogens you studied?

A. I looked at PCBS, did work on styrene.

Q. What is styrene?

A. It is a synthetic chemical that can be formed into a plastic. Here we have polystyrene from which I will drink water.

Q. What did you find out about styrene?

A. It is of a lesser -- if I recall, the potential health effects from exposure to it are relatively low. They are certainly lower than that for vinyl chloride.

Q. Vinyl chloride is in plastic?

A. That's right, as a polymer, not as an airborne monomer.

Q. People who work with wrapping meat used to get meat packers disease from polyvinyl chloride; isn't that right?

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A. I don't know whether they got it from -- they got it from chemicals released in the heating. At this point I am not sure what those chemicals were. They can be altered, they can be combinations of other atoms that would be different but, in any case, there was such a thing as meat packers asthma that was reported in some people experiencing ill effects from thermal cutting of plastic.

Q. The last one you mentioned was styrene. Why don't you tell me the rest of the carcinogens you spent any time at all studying?

A. I have done some work on man-made mineral fibers, looked at issues there although that was not a major activity.

Q. Why don't you give us an example of a man-made mineral fiber?

A. Mineral wool or fibrous glass.

Q. Fiberglass?

A. Yes.

Q. Okay.

A. I think that's large -- I had an article in -- but the majority of my activity has been concerned with asbestos-related exposures.

Q. In fact, you get $250 an hour for testifying in asbestos cases, right?

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A. In a court setting, yes.

Q. What do you get for a deposition?

A. The same for a deposition.

Q. You have given some depositions over the last few months that have gone days at a time, haven't they, in one case?

A. I don't remember.

Q. Do you remember the Armstrong case?

A. No. I don't remember an Armstrong case.

Q. Do you remember a case pending in Baltimore, Doctor?

A. There is a case in Baltimore, a shipyard case with many workers. I don't remember the name Armstrong. I remember --

Q. Do you remember the Adams case?

A. No. The names are not something I would recall. Indeed, in the Baltimore case somebody wanted to -- everybody but one lawyer for a minor player in the case wanted to depose me for two days when everybody else was willing not to depose me at all. You should ask the lawyer why that took place, don't ask me, or even the lawyer that I was willing to testify for, whenever the case comes to trial.

Q. You were willing to testify for the lawyer?

A. I was asked -- I am speaking of the lawyer that asked me to testify in the shipyard case.

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Q. Right. First of all, Doctor, what question do you think you just answered that I asked you?

A. The question of did I -- was I deposed for two days and --

Q. Do you think you just gave an answer to that?

A. Yes, I said I was and I said why. What more do you want?

THE COURT: He didn't ask why. That is our tribal custom.

THE WITNESS: Yes, I am sorry.

Q. Doctor, two minutes ago I said, do you remember being deposed for more than one day in a case, and you sat there on the stand and you said you can't remember.

Now, isn't it true that this deposition was on December 27, 1994 and continued on January 21, 1995? You couldn't remember that three weeks ago that you were sitting through a deposition that went some 500-some pages, you forgot that?

A. You were referring to an Armstrong case. I did not immediately think of this particular case because it was -- that deposition played such a minor role in the case.

Q. These 500-and-some pages are a minor role?

A. That is right. I got to tell you that.

Q. Just so it is clear to you, the reason I was

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referring to it as the Armstrong case, Doctor, is because the name of the defendant is Armstrong World Industries. Didn't you know that?

A. I wouldn't remember that.

Q. Because you are involved in so many cases, I take it.

THE COURT: No. He is trying to curry favor with me because he knows I can never remember a name.

Q. Doctor, how much time did you spend last year working on asbestos litigation, either depositions, trial testimony, preparing for it, writing reports and seeing people you were interviewing and conducting investigations?

A. I don't remember the number of hours.

Q. What percent of your income comes from this litigation?

A. Last year, less than 20 percent.

Q. Do you know a doctor Steven Levin?

A. Yes.

Q. Who is he?

A. He works in the same unit as I do at Mount Sinai. He is in charge of clinical studies there.

Q. Does he testify in asbestos cases also?

A. Yes, he does.

Q. Is he the one that got you involved?

A. No.

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Q. Which one got you involved, which doctor?

A. I have no idea. I was probably asked by some lawyer at some circumstances in the past.

Q. Doctor, what percent of the income of this group at Mount Sinai, the occupational group there, gets its money from asbestos litigation?

A. What percentage of the group?

Q. Yes.

A. I know that Dr. Levin and Dr. Markowitz have testified in asbestos litigation.

THE COURT: I don't see how he can know what percentage of income.

MR. LANDMAN: I probably asked the question poorly. I apologize.

Q. My question was, what percentage of the people in your group, either M.D.s or Ph.D.s testify in asbestos litigation?

THE COURT: That is a different question.

THE WITNESS: I was trying to answer that. I interpreted that as your question because I certainly don't know how much anyone does.

The two that come to mind I have mentioned and -- oh, Dr. Suzuki may also do so, so that is three.

Q. How many doctors are there in the group?

A. Professionals?

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Q. Doctors, medical or Ph.D.s?

A. 10 to 15, perhaps.

Q. You are just not sure about some of the others?

A. That's right.

Q. You think that people who are occupationally exposed to benzene have an increased risk of cancer; is that right?

A. Yes.

Q. What percent is the increase?

A. It depends on the exposure.

Q. How about polyvinyl chloride, do you think they have an increased risk of cancer?

A. Not polyvinyl chloride. I am sure vinyl chloride.

Q. I am sorry, vinyl chloride.

A. That is a carcinogen. That percentage is fortunately relatively low. The number of cases per worker employed in the polymerization works that develop cancer is certainly less than asbestos insulation workers. It is not 30 percent.

Q. We will get to this in a little while, Doctor.

Asbestos -- you think people who are exposed to asbestos -- everybody that is exposed to asbestos has some increased risk because you say there is no threshold.

A. That is correct. I believe that is the case.

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Q. You also take the position if you are exposed to PCBs you have a higher risk of cancer, is that right?

A. Yes. Again the percentage of people exposed that develop, in this case, liver cancer is much smaller than with respect to the typical exposures in the asbestos industry. It depends on the exposure.

Q. Right. Exactly. PCBs are what?

A. Polychlorinated biphenyls.

Q. What were they used in?

A. They are a fluid that often is used in heat exchangers, for example.

Q. Batteries; they are used in batteries, right, or they were?

A. They could be, I believe.

Q. Do you know?

A. At the moment I don't recall the battery issue.

Q. Styrene you also agree is a carcinogen?

A. I am not sure what the, about the carcinogenicity that has been shown there. That I don't remember other than it was not to the degree of that of vinyl chloride. I would have to look up the data again. We did look at some group that was exposed to styrene but I don't remember the results.

Q. What about Fiberglass?

A. I believe that can produce cancer. Certainly

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it does so in animals. There is debate about the degree it does in humans.

Q. You think most mineral dusts increase your risk of cancer?

A. I think if it is fibrous and durable, yes.

Q. How about exposure to coal dust, does that have any --

A. Yes. It produces pneumoconiosis that can be very uncomfortable and deadly.

Q. You think that in addition to people who are exposed in the environment just because of background or in buildings and things like that that most people in the construction industry from the 1940s at least until the middle 1980s were exposed to asbestos, don't you?

A. Yes.

Q. You think that, for example, firemen are typically exposed to asbestos because a large part of what a fireman does is not just putting out the fire, but then ripping down walls and ceilings and ripping up floors to find out where the source of the fire is to make sure they have gotten the whole thing out?

A. That is correct. In some circumstances they can be exposed to airborne asbestos, not attacking the vinyl floor tile but releasing largely acoustic insulation and fireproofing containing asbestos.

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Q. You think that people in the automotive maintenance industry, car mechanics and things like that, garages, also have a higher increased risk because of occupational exposure to asbestos; isn't that right?

A. That is correct.

Q. And people who work on steam engines have a higher occupational risk?

A. That's right.

Q. Most railroad employees would have, either through the exposure to steam, power and steam engines and all of the asbestos that was used before we changed over to diesel?

A. People exposed to insulating or who were present in a round house when that was being done would be. I am certainly not going to have every railroad employee developing asbestos disease because to a large extent that which was applied around the steam engine was contained and the other exposures depend upon the circumstances but there are other exposures in the railroad industry but they are minor in degree compared to the thermal insulation.

Q. Let's take the textile industry. You are aware of the fact that there were some textiles that were 100 percent asbestos; isn't that right?

A. Yes.

Q. So people in the textile industry would also be

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exposed?

A. Those making asbestos cloth, yes, but the textile industry that makes clothes is not exposed to asbestos because it is not brought into the plant. It is a very minor aspect of textiles, but there is no question that

someone making fire blankets could be exposed and at risk.

Q. Also people making sound absorption and filtering equipment because it contained asbestos would also be at a higher risk, isn't that right?

A. Some. It may be that that particular industry is one that can minimize exposures to a very large degree. I could imagine how they could. I don't know exactly what the exposures are because I have never studied it.

Q. Obviously you and other people have studied the high level of asbestos exposure in the shipbuilding industry; isn't that right?

A. Yes.

Q. Also there has been a high level of asbestos exposure in the power plants throughout the United States; isn't that right; for example, Con Ed power plants and power plants all around the United States because of the amount of high energy and high power that is conducted, they used asbestos?

A. They used asbestos, and the people constructing

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those plants and those maintaining the plants where they would remove asbestos would have a risk and reapply it while fixing pipes, would have a risk of cancer.

Q. Certainly, you think that anyone who is in the building maintenance industry would also have a higher increased risk of cancer from asbestos exposure because they would be working around asbestos piping, sitting down in boiler rooms and things such as that, isn't that right?

A. Most people would not. Some could.

Q. If you are the person?

A. To the extent that -- with a broom bang away at an asbestos covering of a boiler, yes, but a lot of building maintenance people don't that. They just do tasks that are not ones that would release asbestos fibers. Dealing with asbestos insulated plumbing, they would be exposed.

Q. Anyone that was in the demolition business would have been exposed in the '50s, '60s?

A. Not everybody. You are trying to make a particular circumstance generalized to a whole trade. Some would, a lot would not. It depends on what they are doing.

Q. You have to know what they are doing all the time to know what their exposure level is, isn't that true, Doctor?

A. Largely so. You can make estimates of what the magnitude of the population might be doing something and make estimates of the population risk. for

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an individual you want to know what he was doing.

Q. In rendering your report in this case you relied solely on what Mr. Buckley told you when you reached your opinion in this case; isn't that right?

A. It was from Mr. Buckley's statements, that's correct.

Q. You just took it all and accepted it?

A. Metro-North didn't provide any information to us. I would have been happy to look at what they might have --

Q. Who hired you?

A. I was asked to do a report by Mr. Goetsch.

Q. Did you ever ask Metro-North for information?

A. I did not, that's correct.

Q. We will get to that in a minute.

A. They don't seem to know what Mr. Buckley was exposed to either. They were --

MR. LANDMAN: I move to strike that as non-responsive and I would ask that the witness be instructed to limit his answers to my question.

THE COURT: That is our tribal custom.

Q. We talked about some of these industries. Let's see if we can try to quantify it.

I have here, and I be happy to show it to you, the 1990 census of population for social and economic characteristics in the United States. You are

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aware of the census bureau?

A. Yes.

Q. You would generally accept what they have to say about who does what in this country in terms of work?

A. They do a pretty good job of establishing that.

Q. Because they conduct the census every ten years as they are required to do?

A. Yes.

Q. According to the census bureau, the construction industry in 1990 had 7,214,000 people; the mining industry had 723,000 people; the textile mill and finished textile products industry had 1,800,000 people; the chemical industry had 1,196,000 people; the primary metals industry had 792,000 people; and the transportation equipment industry had 2,532,000 people; and the trucking service industry had 2,400,000 people.

Would you agree with me that, if you accept your no threshold theory, that all of these people have at least some increased risk of cancer?

A. They have risk from the asbestos that is in the general ambient air.

Q. And their occupational exposure?

A. Indeed, I have written a paper looking at the major industries, their number of people within them and the amount of asbestos disease that can be estimated to come from such and that can be compared with

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the amount that is established on the Seer program. I worked in that program.

Q. I didn't include and I should have, there are 732,000 policemen and firemen so assume 350,000 police and firemen?

A. 95 percent that you talked about have a minimal risk.

Q. How big?

A. Sufficiently low that it is little different from what you and I have. It is quite different from what a construction worker would have or a shipyard worker would have or a brake mechanic would have.

Q. Among the group I gave you were 7 million construction workers?

A. Yes. If I had my research paper I could tell you the expected number of mesotheliomas and lung cancers that come from the construction industry going back to 1940.

Q. You don't have that paper with you?

A. I don't have that paper with me. It was something that I have considered.

Q. 75 percent of all New York City buildings have asbestos; isn't that right?

A. I would expect that they would have it in the heating plant.

Q. Does this building have asbestos?

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A. I wouldn't be surprised if it does.

Q. Do you think it has it in the ceiling?

A. It is possible but I am not worried about it because it looks like it is in good condition and well sealed.

Q. Of course, you haven't been here over the whole time this building has been here to know whether it has always been well sealed, have you?

A. I don't and I don't know if it has asbestos or if it had any asbestos previously.

Q. Doctor, is it your belief that all of these people with an increased risk of cancer from their occupational

exposure of asbestos should be medically monitored for the rest of their life even if they have no -even if they have no physical evidence of exposure?

A. Not everybody that has exposure needs monitoring. There would be little that could be found. I think it depends upon the individual, the degree that he or she visits a doctor annually. That is more related to their physical condition in most circumstances than it is a small exposure to some agent.

Q. You know, you are not a medical doctor but working at Mount Sinai you know that generally once someone gets to be around 40 years old they should have an annual physical?

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A. No. I do not think it is necessary. I did not have one at age 40 on an annual basis.

Q. How often would you have it at age 40; not how often you did but how often would you recommend they did?

A. It depends on the individual.

Q. What about if they were a smoker and had been smoking for 20 years at least one pack a day?

A. I would think he should stop and he wouldn't have to go to a physician for lung symptoms that would be desirable to be examined for some time in the future.

Q. If they stop you at least tell them they should keep going for at least 15 years because the risk stays

pretty high for at least 15 years after you stopped smoking after you have been exposed to cigarettes for 20 years, isn't that true, Doctor?

A. For most of the -- again, I am not going -- it depends upon the individual and the circumstances, the degree to which a physician should be visited.

In many circumstances with the risk, even the risk of taking an x-ray exceeds the probability that you will find something that would be beneficial from the particular visit. That is not a field I work in.

I only know that that has been studied by some people and certain things such as annual chest x-rays, the ACS makes recommendations and I would refer you to them.

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Q. Doctor, isn't smoking the most -- the most preventable health risk in the United States?

A. Yes, by cessation.

Q. Exactly. I think you said that because once you are exposed to asbestos you can't do anything about the asbestos and if you are fearful the first thing you should do is stop smoking, isn't that right, because you can control the smoking; you can't control the past asbestos exposure?

A. That is correct. That is the desirable thing to do whether you are exposed to asbestos or not.

Q. What is the history you got from Mr. Buckley as to whether or not be was a smoker?

A. He was a smoker.

Q. What did he say to you?

A. Pardon.

Q. What did he tell about how much he smoked?

A. From records -- I am not sure whether the particular conversation, my understanding is that he began smoking in 19 -- at age 17 and lie continued until the early 1990s when he stopped.

Q. How much did he smoke?

A. He smoked up to a pack a day; some weeks he would smoke a pack a week. He had a range of smoking habits over what I interpreted to be a fair

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amount of time from one pack a week to one pack a day.

Q. Did he ever smoke more than a pack a day?

A. It was not stated and I would suspect that he probably did on occasion.

Q. You have his deposition in your file, right?

A. Yes, I do.

Q. Did you read it?

A. Yes.

Q. Why did you read it?

A. To see what he -- if there was anything in there that was of consequence that would affect my opinion, and there was not.

Q. Did you think his smoking history would affect your opinion in this case.

A. I think the smoking history, as I gave it to you, was roughly the same as was in his deposition. If you believe to the contrary, please read it to me. I don't recall the exact words in the deposition.

Q. What I would like you to show me is where did you get a record or where do you have a note that indicates he smoked sometimes one pack a week?

A. I would wager it is in his deposition.

Q. Okay.

A. But in any case I certainly have read that. Maybe it was in our interview. Since I don't have his interview, my copy of it, let me look at Dr.

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Markowitz's which states that it is from age 17 to 37 he smoked usually less than one pack per day.

I do very strongly remember statements or text that occasionally it was one pack a week. Most likely it would be in his deposition but I don't recall exactly where at this time but I do recall that being part of the range that was either provided to us or is written someplace.

Q. Since you will be back here tomorrow maybe tomorrow you can show us where it says he smoked one pack a day a week?

A. I don't know if it is in the deposition. I will look and see if it is indicated.

Q. The other thing is I think you testified you interviewed thousands of people?

A. For work histories and our clinical surveys.

Q. How many did you interview a week?

A. I beg your pardon.

Q. How many people do you interview in a week?

A. One can do, when you have a large number coming through, 100 or -- in some circumstances for limited examinations I have had as many as 200 a day, I could interview, do a limited occupational interview that may reflect solely activities relating to the particular agent that we are studying that would

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be 20 or 30 a day. (Continued on next page)

Q. Well, Doctor, how is it, then, that you interview

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up to a hundred people a week, a day, whatever, and you tell us that you have a distinct recollection that Mr. Buckley told you when he was in almost a year ago that he smoked sometimes one pack a week?

A. Some place I had read that or remembered that one pack a week was one of the end points of his smoking history. At this point I can't immediately -- I know it was in that piece of paper, or wherever, but I believe I can find it by tomorrow morning.

Q. You think it is in a piece of paper in your file?

A. I believe it is more likely there than any other place.

Q. I have been through your file, and I didn't see any notes of a history.

A. In 15 minutes, if I look through --

Q. We will leave it for tomorrow.

MR. LANDMAN: But I would ask this: As far as the file, I would like the file to stay here, your Honor. If the doctor wants to look it, he can do it at the end of the day. Then, if he has other records in his office, he can bring those in tomorrow.

Q. Doctor, do you have any other records about Mr. Buckley that you haven't brought here today?

A. I have some material.

Q. Such as?

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A. I can't remember the scope of it at this moment, but there was a couple of depositions of coworkers.

Q. Let me ask you this question. Do you have any handwritten notes in your office you didn't bring here today of an interview with Mr. Buckley?

A. I don't know.

Q. You talked a lot about risk, and you were asked a million different questions about percentages and things like that. I just want to go over a little bit of that with you today.

Specifically, you say he has a 1 to 5 percent risk of dying of cancer due to asbestos exposure?

A. That is my view.

Q. That is I in 100 or 1 in 20.

A. Yes.

Q. Then Mr. Goetsch asked you: Well, how does that compare with 1 in 10,000?

MR. GOETSCH: I believe it was 1 in 1,000.

Q. One in 1,000, and you said it is a hundred times higher?

A. No, I said it is 10 times higher to 50 times higher.

Q. What is 1 in a thousand?

A. It is a risk I wouldn't want to take.

Q. No, no. How is it related at all to his health

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or his normal background exposure? 1 in a thousand. Is there any basis for 1 in a thousand, or is that something you want to throw in front of the jury?

A. That was the value that he asked me about.

Q. Mr. Goetsch.

A. Mr. Goetsch. And it was one that was stated to be a significant risk in an OSHA regulation that was promulgated.

Q. This is why we have to deal with all your numbers here. If he's got a 1 in a hundred chance of getting cancer from asbestos exposure, and then you used that and then you told this jury it is 50 times higher than 1 in a thousand, what I want to know is: Does he have a 1 in a thousand chance of getting cancer in the absence of this asbestos exposure?

A. He has a much greater chance of getting cancer from the variety of spontaneous events and other sources of cancer that we are all exposed to.

Q. Exactly. So that when you threw that number 1 in 50 out to this jury, they could have thought, couldn't they, oh, gee, his chances went up 50 times?

A. No, I don't think they would at all.

Q. Frankly, when I was sitting there, that is what I thought.

A. Well, I am sure the jury would do better than you

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did.

THE COURT: We will all agree on that.

MR. LANDMAN: I will agree on that, I will agree on that.

Q. Then let's talk, because you haven't talked about this at all, what is Mr. Buckley's chance of getting cancer from background exposure, from the fact that people get cancer in this country, unfortunately, as they get older, and they get it at a young age, but the longer you live, you would agree, the longer you live the higher your risk of getting cancer is?

A. Absolutely.

Q. So that when you kept telling this jury that his risk of getting cancer from asbestos will go up, the truth is it is because there is a long latency period, isn't that right?

A. That plays a role. He is not going to get it right away.

Q. Of course. And that is also true for other cancers in this country, isn't that right?

A. That's true. So Mr. Buckley has a sizable risk of developing cancer from a variety of causes. There is no reason to add to it. And that is what should be prevented or it could have been prevented by about a little bit of education and a little bit

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of personal protection.

MR. LANDMAN: Move to strike.

THE COURT: Yes.

I think what he wants to know is, how much of this additional percentage comes from his work after you have figured out how much his exposure is: because he lives in this country, he lives in --

Q. -- in New York City, an urban environment; because he works as a pipe fitter but it is assumed no asbestos exposure; because he has a history of smoking at least a pack a day for 20 years, and that he has continued to smoke apparently since then, he says one cigarette a day; and taking into consideration, for example, family history -- do you know what his family history is with respect to cancer?

A. No, I don't.

Q. Wouldn't that be relevant to know what his risk of cancer is?

A. Not necessarily.

THE COURT: We are trying to isolate what risk arose from his dealing --

THE WITNESS: That is what I gave you. That is what I was doing. Mr. Buckley has a 1 to 5 percent chance of dying of an asbestos cancer. On average, one may have a 20 percent chance of dying of cancer without such an exposure. So his chance of

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dying of cancer could now increase from 20 percent to 25 percent. So his cancer risk could have gone up 25 percent, 5 percent divided by 20 percent. But the estimate that I made was for that particular exposure, what is the likely consequences, considering all other causes of death to be typical of a white American male smoking one cigarette a day, as he is.

Q. Now what I would like you to do is to assume the same thing, except assume the person smokes a pack a day from the age of 17, what is the risk -- and you

have all talked about this latency period being 25, 30 years, and what his exposure was when he was about 30 years old -- so let's say at the age of 65 to 70, if he had continued to smoke one pack a day, what would his risk, and taking all these other background factors into consideration, what would his risk be of having cancer?

A. It would be a substantial one. His risk of developing lung cancer would be between 5 and 10 percent of total mortality. So a pack a day to age 60 is a very potent risk factor. He has nearly gotten to that, though, from his three years of asbestos exposure. But he does not have that as a risk factor for cancer, because if he were smoking a pack a day and stopped smoking, the lung cancer risk within ten years, roughly 90 percent of it would be lost. There is a reduction in cancer risk with stopping. There isn't with asbestos exposure.

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The manifest risk is going to continue.

Q. Did you tell him that, by the way?

A. Did I tell Mr. Goetsch that? Yes.

Q. No. Did you tell Mr. Buckley that when you saw him?

A. I don't remember.

Q. Did you urge him to stop smoking?

A. He may have already decided to do so. Yes, he had already stopped at the time he was interviewed. So I didn't have to tell him to stop smoking.

Q. By the way, let's talk about that. Your records show that he stopped smoking in 1991 or 1992, is that right?

A. That is my recollection. You have my records. I don't know if they are there. But in any case --

Q. This is the only other thing I have. I don't think there is anything else in here about smoking.

A. It doesn't matter, my understanding is that it was early in the 1990s.

Q. Let's go back to the number we are talking about here. You already said the general population gets 20 percent chance of getting cancer if they live to be around age 65. What is the percent of people who get cancer if they live to be around age 65 if they are a one pack a day smoker for 30 or 40 years?

A. It would be higher.

Q. It would be higher.

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A. I don't know --

Q. You don't know the number?

A. I don't know the exact number at this point.

Q. Wouldn't that have been helpful for this jury?

A. No, because we are looking at Mr. Buckley, who doesn't smoke a pack a day until age 60.

Q. The only reason he quit smoking was because he was afraid about his asbestos exposure, he claims. So if we weren't here, he would still be out there smoking; right? Yes or no.

A. Maybe he would be apprised of the risks of smoking independent of his asbestos exposure and cease for that reason at some other occasion. A lot of people who smoke and are not exposed to asbestos, indeed stop smoking for the very reason that it will benefit them.

Q. Doctor, I would like to show you -- this is your chart, which apparently has a risk of lung cancer. Did you prepare this?

A. Yes, I did.

Q. What does that show?

A. It shows the various risks of lung cancer for a non-smoker, for Mr. Buckley who began as a pack-a-day smoker at the upper level of smoking, and stopped, here I have it, sometime in approximately 1992. He stops and then takes up the habit of smoking one

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cigarette a day. So the cigarette smoking risk in this --

MR. LANDMAN: Maybe we should have that marked for identification as Defendant's Exhibit B.

THE COURT: All right. (Defendant's Exhibit B was marked for identification.)

Q. Doctor, maybe you could stand up and show this to the jury.

A. This is the comparison of relative risks, according to effects of cigarette smoking and Mr. Buckley's asbestos exposure. The cigarette smoking on the nonsmoker would be this lower --

Q. That would be if someone was never a smoker.

A. That's correct.

Q. OK.

A. Mr. Buckley started smoking, he stopped, his risk goes down very close to that of a nonsmoker but it begins to rise a bit more over the years from age 40 to age 60. Right now we are looking at a period where he is age 40, roughly 1985. And he might be 39 or 41, but roughly. That I believe is correct.

With respect to an asbestos exposure of three years of this magnitude, it would multiply this curve, which is Mr. Buckley's risk, by an amount proportional to the exposure in that time, and it

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manifests roughly ten years after the exposure began. So it increases his lung cancer risk by about 50 percent.

Q. So you are saying that the risk goes up generally after ten years?

A. Yes. That's when the risk does.

THE COURT: Maybe this would be a good time to recess.

MR. LANDMAN: Fine.

THE COURT: When you leave here, you are directed, except for the transcript of the deposition, you can take that home.

MR. LANDMAN: Yes, I have that right here to give to the doctor.

THE COURT: The reason he wants you to leave it here is that all lawyers are paranoid and if he doesn't leave it here, he will doctor it up.

All right, I will see you tomorrow morning at 10 o'clock. (The jury left the courtroom.)

MR. LANDMAN: May I have the rest of the files?

THE COURT: You are going to take the transcripts home. The rest of the files you leave here.

THE WITNESS: Even my own letters?

THE COURT: Yes. That's right.

THE WITNESS: Well, I am not likely to find the

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answer that I am supposed to look for.

MR. LANDMAN: You can do that right now here.

THE WITNESS: I am not going to spend all night here looking through that, unless you want to -- let me look at it.

MR. LANDMAN: You may be more comfortable at a table and we will spread it out.

* * *

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WILLIAM J. NICHOLSON, resumed.

THE CLERK: You are still under oath, Doctor.

THE WITNESS: Yes.

CROSS-EXAMINATION (continued)

BY MR. LANDMAN:

Q. Good morning, Doctor.

A. Good morning.

Q. I think when we broke you were showing the jurors Defendant's Exhibit B for identification.

A. I thought we were talking about the number of

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cigarettes Mr. Buckley smoked.

Q. No. We had done that earlier, and I am going to ask you about that. We will get to that. Because I am sure you did your homework, right? But I think we were actually on this.

A. OK.

Q. You were showing the jury -- I don't know if you want to stand up again, or whatever you are comfortable doing -- you were explaining to the jury that you charted these with respect to Mr. Buckley, is that right?

A. Yes. As an example of the different possibilities of risk in this case of developing lung cancer. It is only one of the cancers that is involved.

Q. I think it would be a good idea, Doctor, if you could stand up, because I don't think the jury can see it.

This is with respect to this risk of developing lung cancer, is that right?

A. Yes.

Q. The orange-dotted line, what does that show?

A. That is the added risk from his exposure to asbestos during the period of time where he worked in the tunnels from 1985 into 1988.

Q. I take it that shows the risk if he were to continue smoking one pack per day, is that right?

A. This dotted line shows the risk if he had

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continued to smoke a pack a day, beginning at age 19 or thereabouts. And the solid lines here represent the risk from that pack-a-day smoking that ceased in 1991, returned nearly to what would be the risk of a nonsmoker, but he began one cigarette a day recently. Thus, there will be an additional component that will come from that risk and rise as indicated here. This is the asbestos-related risk --

Q. Referring to the orange solid line.

A. -- which would be added to the risk from the cigarette smoking, the risk of lung cancer only. As I mentioned, there are risks from asbestos exposure that affect the lining of the lung and the abdominal cavity, the gastrointestinal tract, and they are much greater in Mr. Buckley's case than his lung cancer risk, because instead of adding a large component, his nonsmoking yields a background risk that is multiplied by asbestos. It is considerably less than the other cancer risks.

Q. Doctor, I am going to show you what has been marked as Defendant's Exhibit C for identification. This is also a chart that you had in your file?

A. It shows the same thing, except it is plotted in different format. Instead of a linear increasing risk, zero, 10, 20, 30, 40, because it does rise rapidly, at times when one plots steeply rising functions, in this case steeply rising risks,

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equal intervals represent a tenfold increase. So this chart goes 1, 10, 100. But the lines are the same as depicted here in this chart. To get to 100 you would have to go way off the chart, and it is difficult to display the lower part of the chart and the upper part in a linear fashion, whereas it is easier to display this here. I thought it was more clear to display it to the jury in this format than in this. But both are available.

Q. Actually, you didn't show the jury either one of these on direct examination. Why not, Doctor?

A. I wasn't asked to.

THE COURT: That is a silly question. He does on direct examination what he is asked to do.

Q. Did you discuss that with Mr. Goetsch beforehand, whether to show charts or not?

A. We didn't discuss whether to show them. I said I had these charts and it is for him to decide what to enter into testimony.

Q. Doctor, just so it is clear to the jury, the 1 here you are talking about is 1 percent, is that correct?

A. No, no, not at all.

Q. What does that refer to?

A. It is the yearly risk of 1 in 100,000.

Q. What is 3?

A. 3 per 100,000.

Q. Per hundred thousand.

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A. Yearly risk. This is based upon smoking risks in the American Cancer Society study of the cancer risk from cigarette smoking.

Q. And so 100 is 100 per 100,000, is that right?

A. Yes.

MR. MOSKOWITZ: I would offer Exhibit C in evidence.

THE COURT: Any objection?

MR. GOETSCH: No objection, your Honor.

THE COURT: Received. (Defendant's Exhibit C was received in evidence.)

A. Per year.

Q. Per hundred thousand per year?

A. Per year.

Q. Doctor, in doing all your calculations, you assume that, number one, there is no threshold for asbestos exposure to cause disease, isn't that right?

A. That's correct, particularly for the cancers.

Q. And you are applying a linear method, isn't that right?

A. Yes.

Q. So, in other words, you assume that the first fiber you get could be as dangerous as the last fiber you get?

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A. There are time factors that play a role in some of the cancers and that is not quite the case. Fiber inhaled yesterday is not going to produce cancer tomorrow.

Q. But under your study in your linear method, the fiber inhaled today could produce damage 30 years from now?

A. That's correct.

Q. And the fact that you got another fiber five years later doesn't increase your risk any more than that one fiber in terms of incremental increase; each fiber you believe causes the damage, if there is no threshhold?

A. That is roughly correct for lung cancer. For mesothelioma, the fiber inhaled five years later, 20 years down the line, has contributed less of a risk than an earlier fiber, because the earlier fiber can cause some damage that other processes in the cancer development would have time to occur. So there is a time factor that plays a role, particularly for the risk of mesothelioma.

With respect to lung cancer, there is a ten-year hiatus between manifestation of risk from exposure, and that is taken into account in what I did. That is why it rises up, beginning on that chart, ten years after the exposure began.

Q. Under your theory, Doctor, a linear method and no threshold problem, if I take one aspirin, it will cause me as much damage as if I take a hundred

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aspirin, is that right, under a linear method?

A. If you take one aspirin versus a hundred aspirins?

Q. Yes.

A. No.

Q. No. Applying the linear method you just applied.

A. You are talking nonsense. That is not what the linear method is.

Q. Doctor, if you take one aspirin and then you take a hundred aspirin, doesn't the hundredth aspirin cause the same amount of damage as the first aspirin under your theory?

A. If you take a hundred aspirin at one time, you are in trouble.

Q. No, that is not the question. If you take one aspirin and the hundredth aspirin, they each cause the same amount of damage, is that right, under your theory?

A. Personally I am not saying that aspirin causes damage. Secondly, aspirin is metabolized from the body, and if you take a second aspirin a day later, it is going to do the same thing as the first aspirin, and the effects will be to relieve pain, basically, over a period of time. The aspirin is removed from the body, and then you do the second day and so on, and similarly you have an equal effect for equal aspirins -- equal ingestion under the

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circumstances.

Q. Doctor, what I want you to assume is that you take one aspirin and you keep taking aspirin the whole day and you take a hundred aspirin?

A. You would be in real trouble.

Q. But under your linear theory, the first aspirin and the hundredth aspirin have exactly the same effect.

A. Not in that circumstance. I am not dealing with aspirin. I am dealing with --

Q. But you are not applying the linear theory there.

A. Because it is an entirely different process.

Q. Doctor, not everyone agrees with you that there is no threshold with respect to asbestos exposure, isn't that right?

A. There are some comments, particularly from industry medical personnel, that would argue against it.

Q. And, Doctor --

A. The majority of the researchers in the field of asbestos do accept a linear nonthreshold theory. It is one that is applied in all regulatory actions by the United States.

MR. MOSKOWITZ: Your Honor, I object as not responsive.

MR. GOETSCH: Let him finish the answer.

THE COURT: He just asked you if some doctors disagree with you. That is all he asked you.

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Q. Doctor, the drinking water, for example, in Baltimore contains asbestos fibers at the level of 28,000 fibers per liter, is that right?

A. I would have no idea.

Q. You would have no idea?

A. At this point.

Q. Well, did you have an idea a month ago?

A. If somebody told me that number, I would probably accept it.

Q. So you don't disagree with that number?

A. It's a remarkably low number, I must say.

Q. 28,000 fibers per liter.

A. Of all sizes, which is usually the way they are measured.

Q. So you don't disagree with that number?

A. I wouldn't disagree with it. I don't have any validation for that number, but that is certainly within the realm of possibility.

Q. It wouldn't surprise you.

A. That's correct.

Q. Doctor, you have done a sampling of asbestos in the ambient air in cities, haven't you?

A. Yes.

Q. And the highest you have found was in Dayton, Ohio, isn't that right?

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A. In one study, that is correct.

Q. And that was due to the fact, in your opinion, that there were four brake manufacturing plants there?

A. I was told that by an industrial person of a company that produced them, and the company was the owner of the plants, the production person.

Q. In fact, in an urban environment there is a lot of traffic exposed to asbestos every day because of the friction in the brakes, isn't that right?

A. That's correct, that is one of the sources in the general ambient air.

Q. And also because 75 percent of buildings in New York have asbestos in them?

A. I would imagine at some location they would, probably more. It is in vinyl tile and in a lot of products from which it is not released.

Q. And because you believe in the no-threshold theory, you actually believe that some people will get as-

bestos disease from the ambient air exposure or background exposure?

A. It's possible, but it is not a fact that would be capable of verification, because of the difficulties of conducting such a study in the other aspects of it.

THE COURT: Let me try to indoctrinate you in my

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theory of my tribal customs. If they ask a question, "Is it possible?" the answer is "Yes, it is possible." Don't go on to lecture about other things.

THE WITNESS: Is it not possible to explain why the answer is yes?

THE COURT: No. That is our tribal custom. I am trying to explain it. The theory is that he is entitled to have you answer his questions, and then your lawyer is entitled to bring out any explanation that you want to. I can give you a lecture about how we came to that theory, but that would bore everybody.

THE WITNESS: I will do my best.

Q. Doctor, you believe that some cases will result in asbestos disease from ambient air exposure, don't you? You believe that? Yes or no.

A. Yes, I do.

Q. Doctor, did you ever sit down and compare the number of hours that Mr. Buckley was exposed to asbestos on the job, as he told you, versus the number of hours that he was exposed to asbestos in the ambient air throughout his lifetime?

A. I could do so. I did not make that numerical estimate because I did not need to.

THE COURT: Don't tell us why. Your lawyer can ask you why. You will drive me to explaining that theory, and then no one will

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forgive you for that.

Q. Doctor, you believe every one of us in the United States has had exposure to asbestos, don't you?

A. Yes.

Q. And based upon your no-threshold theory, all of us have a risk of developing an asbestos-related disease? Yes or no.

A. Yes.

Q. You reached your opinion in this case before you ever went to Grand Central to look at the steam tunnels, isn't that right?

A. I looked at some part of the steam system and other areas in Grand Central much earlier than this case.

There had already been a mess in Grand Central before I met Mr. Buckley.

MR. MOSKOWITZ: I move to strike -- your Honor, may we have a sidebar, please?

THE WITNESS: You asked specifically had I been there, and I answered.

Q. Doctor, you have been told a couple of times by the Court about this. Do you want to come back here and just try this case? Are you here as an expert witness or are you here as advocate?

A. I am here to answer questions honestly.

THE COURT: Then just answer them.

Q. Doctor, you just testified that you have been

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down to those steam tunnels before you rendered your opinion in this report in this case, is that right?

A. I have seen steam pipes at the --

THE COURT: He asked you: Have you been down to those steam pipes?

Q. Yes or no. Before you rendered your opinion in this case, Doctor.

THE COURT: Don't shout at him. That is my privilege.

MR. LANDMAN: All right. Sorry, your Honor.

A. The tunnels, I had not been to the tunnels Mr. Buckley showed me.

Q. Had you been to any steam tunnels at Grand Central Terminal before you rendered your opinion in this case? Yes or no.

A. Could you please define tunnel for me, as you use it with respect to steam pipes that are in place in Grand Central Station?

Q. Did you take an occupational history from Mr. Buckley?

A. Yes.

Q. Did he tell you he worked in the steam tunnels?

A. Yes.

Q. Did he describe where the steam tunnels were located?

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A. He described steam tunnels that he worked in. I have seen steam pipes --

THE COURT: Yes or no, did he describe the steam tunnels that he worked in?

THE WITNESS: That he worked in? Yes.

THE COURT: Next question.

Q. Had you been in those steam tunnels in the lower level of Grand Central Terminal before you rendered your opinion in this case? Yes or no.

A. I am rendering my opinion now --

THE COURT: No, no. Before you first rendered your opinion, you wrote a report giving your opinion. Did that report precede or follow your first visit to the tunnels described by the plaintiff?

THE WITNESS: My report followed -- preceded my visit with Mr. Buckley to his steam tunnels.

THE COURT: That is what we are trying to find out. Thank you.

Q. Eventually you did go to steam tunnels, is that right?

A. Yes.

Q. When you went there, it was hot and humid, is that right?

A. To some degree.

Q. How hot was it?

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A. I didn't take a measurement.

Q. Did you hear hissing when you were down there?

A. I don't remember.

THE COURT: Remember what I told you, that these artificial rules are very artificial and it is hard for someone that is not used to them to follow them.

Q. In formulating your opinion in this case, you relied primarily on the Harries study of dust exposure in the ship repairing industry?

A. That was a study I relied upon. I relied on others as well.

Q. Well, you listed the ones you relied upon. The four studies were: the Balzer's study we talked about yesterday, the Harries study, an article you wrote, a case study on the TLV approach, is that right, and finally the Selikoff study on the mortality experience of insulation workers in the United States. Is that correct?

A. Those were the principal references I gave for the opinion in terms of the exposure that the data from Harries, from Balzer, and data that we had collected ourselves form the basis for estimates of the air concentrations from the work Mr. Buckley performed.

Q. When you did all that and you made your time adjustment, you came up with a 2 percent chance of dying from cancer related to asbestos exposure, is

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that right?

A. That's correct.

Q. Doctor, you relied on the Harries study of insulation workers, is that right?

A. Yes.

Q. That wasn't a study of pipe fitter, was it? Yes or no.

A. It was a study of insulation removal. I can't tell you the name of the trade that was doing it.

Q. Wasn't it a study of people also installing insulation?

A. There was additionally such data. I did not use that.

Q. Doctor, haven't you actually done a study on occupational exposure to insulation dust in the United States?

A. Yes.

Q. In the United States shipyards, isn't that right?

A. The data was collected not in shipyards; in land-based construction to an overwhelming extent.

Q. Doctor, wasn't the name of your article "Direct and Indirect Occupational Exposure to Insulation Dust in the United States Shipyards"?

A. Yes. And I was extending the land-based data to the type of exposure expected aboard ships using the same materials, since this was a shipyard

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conference that was the focus of the discussion.

Q. This article deals with shipyards that I just told you the title?

A. It deals with the type of exposure that would occur in shipyards based upon measurements largely elsewhere.

Q. And, Doctor, we can agree that ships have lots of insulation or did at that time period, isn't that right?

A. Yes.

Q. Now, Doctor, in your study you came up with a table of average dust concentrations in insulation work, didn't you?

A. There are some tables in that that reflect concentrations with work according to different practices and different respiratory protection usage.

Q. Let me show you table 1.

THE COURT: Referring to his study?

MR. LANDMAN: Yes.

Q. And, for the record, this study I just handed you is a study that you wrote, isn't that correct, Doctor?

A. That's correct.

Q. It is the title that I just read a moment ago, isn't that right?

A. Yes.

Q. In the table that I just gave you it says:

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"Average dust concentration in insulation work." Isn't that right?

A. Yes, and it describes various activities.

Q. And it describes the type of work, isn't that right?

A. Yes.

Q. In fact, when it is talking about insulators, this table does not specifically mention anything about removing insulation; it talks about mixing and applying cement and cloth covering to insulation material. Is that right?

A. Yes.

Q. For poor ventilation, let's assume poor ventilation, what is the concentration of fibers?

A. An average for that activity over the full process, the concentration was 4.6 fibers per milliliter.

Q. Doctor, doesn't the Harries study that you relied upon, instead of your own study, have much higher numbers for that activity?

A. They have for all insulation work, which includes the work that I described in the next line in my table, the average is 8.8 fibers per milliliter.

Q. What you found was 5.2 for good ventilation and 11.5 for bad, is that right?

A. Sometimes you are mixing cement and applying that,

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so there is a variety of activity.

Q. Right. But you used the higher numbers instead of your own numbers, didn't you, Doctor?

A. I didn't use the 8.8 of Harries, nor did I use the 4.6 or the 11.5, of my work on application. Those numbers are very similar. You average over these different activities and you are not going to be far different from Harries. I used Harries measurements on removing asbestos insulation by whatever trade removed it. I made measurements in that process because that was applicable to Mr. Buckley's exposure.

Q. Doctor, isn't it true that if you are mixing cement with asbestos, what you are doing is basically ripping

open bags and pouring in dry asbestos fiber containing material?

A. That's correct.

Q. And you know that the insulators used to do that. They all testified that the bags would be covered with dust when they would do that and the dust would fly up just like if any of us tried a little experiment, bought a bag of sand and ripped it open, we would get a cloud of dust coming up?

A. They could put it in a bag or in a bucket. Both cases it releases it. The time when this is high is perhaps for one to two minutes. Thereafter it is down, and that is being measured in this as well

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because that is their whole process.

Q. But that is their job, to mix that and put that insulation on by cementing it around the pipe, isn't that right?

A. That's correct. (continued an next page)

BY MR. LANDMAN:

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Q. And one of the things that shows a high level is cutting materials for later use; isn't that right?

A. The cutting operation is the primary source of dust in the cutting and applying that I listed here. That

cutting does release high concentrations, as does the mixing.

Q. In fact, the insulators that you studied which is what they did, used power saws for cutting the material; isn't that right?

A. In some cases, yes.

Q. Did Mr. Buckley ever use a power saw down in that pipe tunnel, do you know?

A. I don't recall him saying that he did.

Q. A power saw would generate more dust than a knife or regular saw, wouldn't it?

A. It would depend on the amount of ventilation on the power saw.

Q. Assuming the exact same place, using a regular saw or a power saw --

A. A regular saw is not easy to ventilate. It depends on the ventilation. we were devising ventilation devices, so the answer is, it depends. That is my answer to your question.

Q. Doctor, I want you to assume the same ventilation,

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whether you use a hand saw or a power saw.

A. With no ventilation a power saw will release more dust.

Q. Thank you, Doctor. Now, Doctor, the area of concentration that ended up with the highest amount, 67 fibers, was what?

A. It was spraying asbestos material on to turbines or other structures, usually a turbine because of the convoluted shape.

Q. Why was there so much exposure if you did that?

A. Because they were being distributed into the air and the binder was not sufficient to maintain -- keep complete dust control. It was on the -- basically, the dry fiber process, which this was, it depended upon fibers being wetted as they passed through a nozzle. It was a process that was blowing the fibers into the air literally.

Q. They have a -- one of the jobs an insulator does as opposed to a pipefitter is they call them spraymen, right, and they come in and spray this stuff right on these pipes; isn't that right?

A. Not insulators, actually. They don't spray it on the pipes.

Q. It is not a insulator?

A. Wait a minute. The sprayman happens to be a plasterer and he is spraying it on ceilings like this.

Insulators rarely spray asbestos and they would

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probably bring in some outside contractor to do it. It is a process of thermal insulation in this unique --

Q. Harries studied insulation workers on shipyards also, that you relied upon?

A. I don't believe he -- I relied on his study. We are now nitpicking about --

Q. Answer my question, please.

A. I don't know if -- he certainly measured insulation application. That would be presumably applied by insulators.

Q. Thank you. Now, your own chart, you just told this jury that spraying isn't insulation but your own chart is labeled Average Dust Concentrations in Insulation Workers, and underneath that you have various categories. One is mixing and applying cement and cloth covering to insulation material, one is cutting and applying insulation block or section of pipe covering.

You say at least 75 percent of an asbestos worker's time when using asbestos materials is spent on the above jobs. Then you say, cutting materials for later use, and, finally, you say, spraying turbines with asbestos fiber. You have that under insulation workers, am I correct, yes or no?

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A. I have it under insulation work.

Q. So spraying turbines with asbestos fiber is something an insulator does, or is this study wrong?

A. It is something done in insulation work. An insulator is a trade. He may occasionally do that.

Q. There is no further question. That was my question. You answered it. Thank you.

Now, Doctor, in your study which you chose not to use the numbers for, you state, as follows, on page 39, if you want to follow along to see if I read it correctly, "The job study included the blocking of boilers and breachings, covering of pipes, insulating of turbines (blocking, cementing and spraying), cutting with hand saws and power saws and mixing of cement. The average concentrations found for several work practices are listed in table 1," which is the table we just referred to, right, Doctor?

A. Yes.

Q. "Individual counts range from less than .1 fibers to more than 100 fibers, however, when averaged over the time workers spent on a given job using asbestos, the average exposure level was 6 fibers. This average took into account the dustiest jobs in areas with poor ventilation as well as the clean ones in well ventilated areas. If one considers that most asbestos workers spend more than half their time

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working with materials other than asbestos, the long term average asbestos exposure of insulation workers

today would be under 3 fibers." Is that right, did I read it correctly?

A. I don't know. I don't have page 39.

Q. You don't?

A. No. I have page 40 and page 38. I am not disagreeing --

Q. Right here it is. I don't know why the page number got cut off.

A. That is correctly read.

Q. Why didn't you use these numbers instead of the Harries numbers?

A. Because these numbers don't apply to removing asbestos. That is what Mr. Buckley was doing.

Q. What you have done is you have relied on the study, for example, of Dr. Selikoff in preparing this chart, haven't you?

A. I have relied upon the study of Dr. Selikoff where I have information as to what the exposures were for the excess mortality that is seen amongst long term insulation workers.

Q. To get to this 1 in 100,000, 3 in 100,000 you relied on a study of insulation workers?

A. No. I didn't. I relied on the American Cancer study of the population of in the United States.

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Q. For smoking?

A. Yes.

Q. You also relied on the Selikoff study for insulators with respect to the increased risk of asbestos exposure, yes or no?

A. I did to obtain the value of 2 percent. That is not part of that chart. That chart is only a minor component of the total risk of Mr. Buckley.

Q. Wait a second. Are you telling me that if you go and look in the American Cancer publications they will show these indications for asbestos?

A. No, they don't have that.

Q. Where did you get that information?

A. From the comparison -- that came from the large body of data that I have analyzed with respect to exposures and particular cancer risks. It is in a document that you have.

The estimated exposure that I used for that came from Mr. Buckley's statement that he did one hour a day and, largely Harries and Balzer, and to some extent my data on concentrations observed during the removal of asbestos materials.

Q. Doctor, you have listed, among the four things you relied upon, the Selikoff study on the mortality expe-

rience of insulation workers in the United States and Canada; is that correct?

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A. That's correct. I told you that is what was providing the information on what the excess mortality was amongst workers exposed to virtually exclusively the application of insulation. They would, but, very occasionally, remove asbestos. The totality of their exposures is what gave rise to their effects.

I have made estimates of what the average exposure of that was in earlier years and later years. You read some of them here.

Q. Is it your testimony under oath that Exhibit C absolutely does not rely in any way whatsoever to Selikoff's study?

A. The Selikoff's study --

Q. Yes or no. Do you want to hear the question read again?

A. The Selikoff study plays a role in the answer that I gave with respect to where I obtained data on risk.

MR. LANDMAN: Move to strike, and I wonder if the reporter could read the question back to the doctor?

MR. GOETSCH: The answer is not responsive.

THE COURT: Let me hear the question. (Record read)

MR. LANDMAN: I think it is.

THE COURT: What is the answer? Read me the answer. (Record read)

THE COURT: That is not exactly yes or no but the

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answer you get from that is, no. He is not saying he didn't rely on it in any way.

MR. LANDMAN: I will accept that, your Honor.

THE WITNESS: I beg your pardon.

Q. Doctor --

A. I just want to make sure the answer is correct. Did you --

THE COURT: He said, did you rely on it in any way, and then you said it played a part.

THE WITNESS: So the answer is, yes, I did rely on it in a way.

THE COURT: That is what I said.

THE WITNESS: I thought you said no.

THE COURT: He said, did you testify that you did not rely on it, and you said you did rely on it.

Even our spouses could understand that.

BY MR. LANDMAN:

Q. Doctor, one last question with respect to this study that you did of insulation dust in the United States shipyards, occupational exposure. How long did you work on this study?

A. We made measurements of different times over two

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years in various locations where insulation work was being done.

Q. You ended up with, on page 39, with average exposure levels at what, Doctor?

A. In land based work while working with insulation there were six fibers per -- while working with asbestos insulation, there were six fibers per CC.

Q. In 1980, what was the Permissible Exposure Limit in the United States?

A. Two fibers per CC.

Q. When did two fibers start, Doctor?

A. 1976.

Q. Before that, what was the limit?

A. Five fibers per CC.

Q. Before that what was the limit?

A. It was in particles per cubic foot. It varied between -- there were suggested levels but in earlier years it was 5 million particles per cubic foot of all different materials.

Q. In 1971 wasn't the standard 12 fibers per cubic centimeter?

A. That was a suggested standard by a private organization. OSHA -- OSHA established the standard in 1971, an emergency standard of 5 fibers per CC.

Q. An exhibit that plaintiff put in as Exhibit 2051

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states, "The first OSHA standard for permissible exposure level for asbestos was set in 1971 at 12 fibers per cubic centimeter," is incorrect?

A. I am not sure what was incorporated from the ACGIH in a preliminary step by OSHA. It could have been 12 fibers per CC. It may have been something else. I can't speak directly to it.

I can speak to the time that they established their own standard as opposed to utilizing the ACGIH.

Q. You don't know if you agree with what I just read or not?

A. Without looking at the document I would pass on agreement or not.

Q. Do you want me to show it to you? Would that help you?

A. The document, yes.

Q. Showing the doctor Plaintiff's Exhibit 2051 --

MR. GOETSCH: Your Honor, I would like to point out that that is Metro-North's consultant's own document. It was offered as an admission of Metro-North's consultant who educated the plaintiff regarding various matters when they went to the class.

MR. LANDMAN: I don't know what the admission part means but it is a document that was part of the class that Mr. Buckley went to. I

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would agree to that.

MR. GOETSCH: It was simply representing that is what was in the class.

Q. Is that correct or not?

A. It is in there. It is some text of -- I don't know by whom.

Q. That is correct?

A. No. I can't say because I don't have an OSHA -- I don't have the initial early adoption of ACGIH standards by OSHA. The ACGIH was going through a transition period at that time in the 1969-1970 period of time and I don't remember what was permanent and what was temporary and whether OSHA made permanent and temporary.

I do know that in December of 1971 OSHA published their own standard of 5 fibers per milliliter thus it would be higher to that prior to that for the one year that OSHA existed at that time. That is all I can say. The number I can't speak to yes or no at this time.

Q. I thought a couple questions ago I asked you what the number was and you threw out a number and you told us that was the number. Now you are telling us you weren't sure?

A. Exactly what I told you was the case. In December of 1971 OSHA issued an emergency temporary standard for asbestos, one of the first that they set on their own grounds, of five fibers per milliliter.

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It was reaffirmed with the permanent standard in 1972 with five fibers per milliliter.

Q. The question is, what I read to you, do you know, yes or no, is it correct?

A. I cannot state that without seeing --

THE COURT: He said several times he cannot answer that question. Get on to something else.

Q. Doctor, you have the air sampling data from Grand Central and you had that before you rendered your opinion in this case; is that correct? That is out of your file?

A. I don't know when I received this document, this set of data so I can't answer whether I had -- I am very likely to have received it after I wrote the letter in March but I can't be sure.

Q. There is a better copy for you. Does this information change your opinion at all?

A. No, it does not.

Q. It gives air samples for various locations at Grand Central Terminal?

A. Yes.

Q. It gives air samples starting in 1985 that goes through 1988; is that right?

A. It gives data from 1987 through 1988.

Q. Isn't there a page with 1985?

A. Not in what you just gave me.

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Q. Can I see it?

A. Yes.

Q. Doctor, did you also see a page that looked like this, 1985?

A. I saw this sometime.

Q. Okay. All right. Looking at those samples for 1985, 1987, 1988 and in 1986 the standard changed from 2 fibers to .2, is that right?

A. That's correct.

Q. First, are there any readings on all those tests that are 2 fibers?

A. There were none of 2 fibers for the areas sampled.

Q. Now, take another look at it. Were there any, even though part of these were done before the standards went from 2 to .2, and that would be a drop of a factor of 10; isn't that right?

A. That's correct.

Q. Are there any samples that show a .2 or above finding?

A. None for the areas sampled and reported in these sheets.

Q. In fact, Doctor, what is the highest finding that was found?

A. It would appear to be up to .01 in some cases

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upper limits as opposed to actual measurements.

Q. .01 is what compared to .2?

A. It is 20 times lower.

Q. Thank you. None of this would change your opinion in this case, would it?

A. None whatsoever.

Q. Doctor, you have done ambient air sampling, haven't you?

A. Yes.

Q. For what purpose?

A. To look at the issue of what is the general background in the ambient air, what may be the sources of that background.

Q. Doctor, in fact when you did your insulation study you did some ambient air sampling, didn't you? Not you, your people did?

A. We may have done some background in an area where insulation work was being done nearby. We certainly did sampling across a room for insulation work. I don't quite recall the circumstances such as you described that we did ambient air sampling of insulation work so I am qualifying it because of that ambiguity.

Q. You believe that there is an increased risk of cancer with respect not just to asbestos disease but of cancer with respect to any exposure to

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asbestos whatsoever?

A. Yes, I believe there is an increased risk from exposure to asbestos and correspondingly at low exposure levels in the environment at a corresponding level.

Q. You believe that the greater the dose, the greater the risk?

A. Yes.

Q. In fact, Doctor, you believed that over 100 million people in this country have an increased risk of cancer due to asbestos just by fact that they walk around downtown in whatever city they happen to live in?

A. A very tiny increase, yes.

Q. But you do believe they do?

A. Yes.

Q. You don't have any hard data to support this, do you?

A. Other than the linearity of data at higher exposures, stated that a specific experiment to validate effect, to identify effects from low exposures, is not feasible.

Q. Doctor, you agree that crocidolite is the most potent form of asbestos for mesothelioma?

A. Yes.

Q. You think it has anywhere between 2 and 10 times as much risk as chrysotile?

A. Yes.

[415]

Q. Doctor, you had reviewed after you wrote your report what the nature of the asbestos substance was at Grand Central; isn't that right?

A. Yes.

Q. Doctor, in that connection, you didn't find any crocidolite, did you?

A. I looked through data from hundreds of samples. I believe the number was in excess of 300. I recall three samples that did show material that contained a small amount of crocidolite.

Q. Can you show me where that is, what areas in the terminal that would be?

A. one was on the sixth floor, south side offices, 2-inch pipe on wall, file storage room.

Q. A 2-inch pipe?

A. Yes.

Q. Did Mr. Buckley ever tell you he worked on the sixth floor?

A. No.

Q. Tell us where the other two were. If it helps you, one was on the seventh floor.

A. I have that one, seventh floor, east side, sprayed on insulation.

Q. On the walls of a large studio?

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A. Yes.

Q. Did Mr. Buckley ever tell you he worked in that area?

A. No.

Q. Where is the other one?

A. There is a third one in the kit room, south platform E, hot water pipe.

Q. How long was that?

A. I beg your pardon.

Q. How long was the pipe?

A. It is apparently a 4-inch hot water pipe. I don't know whether -- I assume it is a diameter rather than a length.

Q. That was out of some 300 samples that were taken; isn't that right?

A. Something of that order. There may have been one more. I am sorry. There are two more; in the east tunnel under Track 100, perhaps it is the same -- it is perhaps the same tunnel. The same steam pipe, thus when sampling the same application process.

Q. What percent crocidolite was that?

A. Is it kind of obscured but it could be 8 to 10 percent. It might be 3 to 10 percent. I suspect it is 8 to 10 percent.

Q. The rest was something else?

A. Yes.

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Q. How large was that pipe?

A. 16-inch steam pipe.

Q. When you rendered your opinion you did not assume that Mr. Buckley had ever been exposed to crocidolite because that would be complete speculation?

A. That is correct, I did not.

Q. Doctor, you testified, I thought, on direct examination that you reviewed hundreds of samples and only found one, I think you said, or two that didn't contain asbestos-containing material. In fact --

A. In tunnels, I think. I don't remember the question but I thought it was --

Q. Your review of what is down there is based upon this document that I have shown you which is Plaintiff's Exhibit 2403, is that right? I am not asking you the number.

A. Yes.

Q. Is that the document you relied upon to determine which pipes did and did not have asbestos?

A. Yes. That would be the document that I relied upon. There was a some very small percentage of crocidolite used, as we indicated.

Q. Now I am on a different question. What I asked you is you said that virtually every pipe but one or

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two had asbestos on it. But as you look at this document, in fact, there are several more than one or two where the report came back and said, undetected; isn't that right?

A. In the tunnels. The conversation you are referring to refers to work in that area down on the sixth and seventh floor but in the tunnel work.

Q. The tunnel you are referring to is the utility level; isn't that right?

A. Yes, and they begin, the tunnels, descriptions begin, you don't have pages, but GCS0219-1, and thereafter

there is a very large number of pages talking about subway tunnel passageways characteristic of the areas that Mr. Buckley was speaking of.

Within those, I believe we just did find one that had crocidolite and I believe in the next 150 samples there was one that had no asbestos. Yes. On 48th Street steam tunnel, the number is GCS0227-110.

Q. Doctor, there are other areas that Mr. Buckley was working on that did not have asbestos-containing material; is that correct, other areas of the station?

A. He was working elsewhere in the station but it is his tunnel work that we were focusing on and that is the largest contribution to his asbestos risk.

Q. Doctor, what else did Mr. Buckley do during his job other than work in the tunnel?

A. He was doing pipe fitting work elsewhere in the,

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on occasion, in the stations. In the period of time from 1985 to 1987 his work was predominantly in the tunnels. Thereafter, he worked largely elsewhere.

Q. Doctor, when you say that, though, what was his job, what was he doing?

A. I would imagine he would be doing pipefitting work.

Q. You didn't ask him, did you?

A. I imagine I did. I didn't necessarily ask every single detail. I would have asked him if he had done any asbestos removal work and to my recollection he stated he did not, and that is also to my recollection of what was the circumstances in his deposition.

Q. Doctor, you have done a lot of these interviews of people. You agree that there can be errors in the reporting of what someone's exposure is; isn't that right?

A. Yes.

Q. Doctor, basically what you did is you accepted Mr. Buckley's statement to you that he spent an hour to an hour-and-a-half doing this type of work, cutting and applying insulation -- not applying, but cutting away and taking away insulation?

A. Yes. I accepted his statement as to what he did. It was an activity that is memorable and I believed Mr. Buckley.

[420]

Q. You didn't factor into that at all that when Mr. Buckley saw you he had been sent there by a lawyer and already had a lawsuit pending, did?

A. I didn't -- I was aware of that and being aware of it I still accepted Mr. Buckley's statements.

Q. Doctor, how did you get involved in this?

A. I don't recall.

Q. Did Dr. Markowitz call you up and say, look, we got a new case, or did you call him up?

A. I believe it was through Dr. Markowitz that I was contacted but I don't recall.

Q. He called you then?

A. I don't recall.

Q. You have actually interviewed some other clients of Mr. Goetsch's in connection with this, haven't you?

A. I would have spoken with whoever -- I believe there were other individuals with Mr. Buckley at the steam tunnels. I don't recall other interviews at Mount Sinai with other clients of Mr. Goetsch.

Q. Do you know if Dr. Markowitz examined anyone else at Mr. Goetsch's request?

A. I believe he did. I believe that from reading something that I recall on that so I am certainly willing to grant that he may have. I don't recall my being involved with that person.

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Q. Doctor, when you made that statement that sometimes people don't get accurate or give accurate occupational exposure, that was in connection with an epidemiological study that you were involved in where people weren't involved in a lawsuit; isn't that right?

A. It depends on the circumstances.

Q. Do you understand my question?

A. I don't know the answer to your question when -- you -- I don't understand your question. You are making a question.

Q. I will rephrase the question.

The question is, as part of your doing research in epidemiological studies, isn't it true that even if people are not involved in a lawsuit you can't be certain that you are always getting an accurate occupational history with respect to exposure to asbestos, yes or no?

A. On some items that is correct; in others it is quite good.

Q. Asbestos fibers are not the only cause of mesothelioma as far as you are concerned; isn't that right?

A. Other fibers can produce the disease as well.

Q. When you met with Mr. Buckley, had you done your chart and all of this with respect to the risk or did you go back and do that after the fact?

A. I did that in the last few days.

[422]

Q. You wrote your report on March 11 and you had examined or interviewed Mr. Buckley on February 4. I take it that on February 4 you didn't know exactly what his increased risk was, did you?

A. I had a pretty good idea.

Q. Doctor, my question is, did you know it was?

A. 1 to 5 percent?

Q. You wrote 2 percent here, but a 2 percent chance?

A. I estimated it to be that and it would have been done at that time.

Q. Did you tell Mr. Buckley that?

A. I don't remember.

Q. What did you tell Mr. Buckley?

A. I don't remember that conversation. I would certainly tell him that -- I believe I would have told him that he did have a substantial increased risk of cancer.

The exact magnitude, I don't remember conveying to him. I don't remember the conversation, in fact, but I would imagine I would do that.

Q. Based upon this chart, you told him, among other things, you told him he had -- give me the words you told him, a substantial increased risk of cancer?

A. That is what I believe he has.

Q. My question though --

A. I believe I would have told him that.

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Q. You would have told him that?

A. I believe I would have. I don't recall the specific statement.

Q. What did Dr. Markowitz say to him about that?

A. I don't remember.

Q. If asbestos was less than a 10 percent likely factor in developing cancer in one individual, you would not consider that to be a substantial contributing factor, would you; yes or no?

A. I am sorry. I don't understand the question.

Q. I will ask it again. If asbestos was less than a ten percent likely factor in developing cancer in an individual, you would not consider it to be a substantial contributing factor?

A. Quite the contrary. A 10 percent contributing factor to cancer, the overall cancer risk is very substantial.

Q. Back to one of your depositions. In the Adams Armstrong case that you gave on December 27, 1994, two months ago, you were asked these questions and gave these answers, Doctor --

MR. GOETSCH: Can I see a copy?

MR. LANDMAN: There are so many transcripts. I didn't make copies of them all. You can read over my shoulder if you want:

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"Q. What is your use of the term 'substantial'?

"A. It would be in the percent range -- "

MR. GOETSCH: Your Honor, objection. He is starting a line of questioning in the middle.

MR. LANDMAN: I will read more. Fine. Do you want me to start here? I will start here.

Page 73:

"Q. Do you have, do you have an opinion concerning where Fiberglass ranks on the scale of carcinogenicity for mesothelioma in relation to any of the asbestos fibers?

"A. It is way down.

"Q. Significantly less than --

"A. In terms of typical environmental exposures it is -- the contribution to either lung cancer risk or mesothelioma risk is -- in a population, working population -- is much, much lower than were corresponding exposures to any of the asbestos varieties in the past."

Continuing on page 74:

"Q. If we hypothesize that in a given shipyard case an individual bystander was exposed to asbestos and possibly to Fiberglass, do you have an opinion concerning whether Fiberglass was also contributing to the mesothelioma?

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"A. Its contribution in the shipyard setting would be extremely low.

"Q. Would it be in your view a substantial contributing factor?

"A. It would not be substantial in my use of the term 'substantial.'

"Q. I am sorry, Doctor, I didn't hear your answer.

Another lawyer speaks and says, "He said, no." The witness states: "I said no according to my use of the term 'substantial.'

"Q. What is your use of the term 'substantial'?

On page 75:

"A. It would be in the percent range.

"Q. What would that be?

"A. Less than 10, more than 1 and let me leave it uncertain, at that range.

"Q. I am not sure what is substantial, less than 10 or more than 1 or is insubstantial less than 10 or more than 1?

"A. Oh, for it to be a substantial contributor it would have to -- would it not, 10 percent I would term a substantial contributor. That is where I am sure of. Okay. I am fuzzy. I would be fuzzy below that.

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"Q. I just want to understand, if something is less than 1 percent likely to have contributed, that would not be substantial in your view?

"A. In most circumstances that would be correct.

"Q. Okay. And somewhere between 1 and 10 you would say was substantial but you are not sure where?

"A. That's correct.

"Q. Okay. 10 percent would be"--

continuing on page 76, "substantial?"

"A. Yes."

Was that your testimony two months ago?

A. Apparently it was in reference to what we were talking about as a legal issue as to --

Q. There is no question. You answered the question. That was your testimony. Doctor, you are not qualified to testify about how asbestos causes mesothelioma, lung cancer or asbestosis, are you?

A. I am not a biologist nor an oncologist.

Q. My question is, you are not qualified to do so, yes or no?

A. It begins with an exposure.

Q. You can't answer that question yes or no?

A. On the full mechanism I don't think anybody can

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answer the question.

Q. Page 76, same deposition, the first question:

"Q. Do you have an opinion to a reasonable degree of medical certainty as to how it is that asbestos causes mesothelioma?

"A. on the biological process I have no opinion.

"Q. Okay.

"A. I am not a -- I don't do that work.

"Q. Is the same thing true with the diseases lung cancer and asbestosis?

"A. On the molecular process it is the same. I mean, people are working on that now and I know some of the results but I am not -- I am not qualified to discuss it in this setting.

Q. Was that your answer two months ago?

A. It is. It was two months ago. It is today.

Q. You, Doctor, assume, based upon a theoretical model based on data that has been accumulated from high dose exposures, that there will be an increased incidence of asbestos-related diseases at all points of

significant -- what you would call significant exposure in the occupational setting, yes or no?

A. Yes, I do.

Q. Doctor, do you agree with me that the typical

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working lifetime is about 40 years; isn't that right?

A. 40, 45 years.

Q. The insulation workers that you were studying were -- had been, on the average, working in that field about 25 years; isn't that right?

A. Selikoff said he spanned all age groups and 25 years is a reasonable average for the group, I believe.

Q. Doctor, there is no data available that actually reports asbestos-related cancers beyond those expected in the normal environment without asbestos exposure at exposures to asbestos over a 40-year-period below .25 fibers per milliliter?

A. I would like to look at the EPA document to review the various studies to recall the possibilities before answering. At the moment I can't immediately think of such a study.

Q. Back to your deposition two months ago.

Page 88:

"Q. Would you agree that there are no data currently available that currently reports the incidence of asbestos-related cancers beyond that expected at exposures below .25 fibers per milliliter?"

A. You said 2?

Q. .025. I will ask that question. Would you agree

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now there is no such data? I will give you the question again.

A. Give me the question again.

Q. You would agree that that is no data currently available that actually reports the incidence of asbestos-related cancers beyond that expected at exposures below .025 fibers per milliliter?

A. I completely agree with that.

Q. The ambient air tests at Grand Central don't show any numbers above that?

A. For those areas sampled, that is correct. The locker room didn't have it and so forth.

Q. Doctor, the measurements of exposure in your own studies have uncertainty in them, don't they?

A. Indeed.

Q. You do the best with the data that you have?

A. Yes.

Q. This linear dose response model that you use was earlier used with the radiation research, isn't that right?

A. It has been.

Q. Doctor, you know, we had touched on this but I

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went over your CV yesterday and on this issue of the radiation exposure and the soldiers, I thought you suggested that you were not really that involved, but when I read your resume it says that from 1952 to 1955 you were a First Lieutenant in the Air Force and that you actually are the person who developed instruments for studying the effects of ionizing radiation, is that true?

A. I did that work, yes.

Q. And studies concerned the soldiers that were being exposed at the test site?

A. They were concerned with Air Force personnel and airplanes. You were talking about didn't they match -- march soldiers up near the blast site? At some point I know they did. I don't remember them doing it in the particular time you were asking me. That is the simple statement.

I was at one test and I did make measurements using that instrumentation. They were referring to an

entirely different activity. I tried to make that very clear.

Q. Doctor, just so it is also very clear, you have never done any followup with that, yes or no?

A. I have not done so personally. I was out of the Air Force in 1955 shortly after that test series.

Q. You are in the field of environmental disease?

A. I am doing measurements now in terms of radiation effects.

Q. But not on those soldiers. The radiation effects you are doing now are with respect to people who claim occupational exposure from medical x-rays and things like that; isn't that right?

A. No.

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Q. Such as medical technicians who take x-rays?

A. No.

Q. What is the research you are doing?

A. It is the effect of exposure to radon in the home setting; radon released from minerals in the ground that builds up in the house and is inhaled by people.

Q. Is ionizing radiation a radon, does that come from radon?

A. Some does. Radon is a radioactive substance. It releases an ionizing particle.

Q. In that connection, how many people in this country have been exposed to radon?

A. I would imagine everyone in this country has been.

Q. You have found that radon also has no threshold; isn't that right, for disease?

A. That would be my view. I can say that people living in New Jersey are affected at the concentrations in that state where the study I am conducting is taking place.

Q. So it is your opinion that they have a higher risk of cancer; isn't that right?

A. Yes.

Q. From the radon exposure?

A. Yes.

Q. About how many people in the United States have a

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higher risk of cancer from radon exposure, Doctor?

A. They all have to.

Q. All 200 million, all of us?

A. To a greater or lesser degree. It can be quantitated to a reasonable extent although there are uncertainties in the estimates.

Q. You believe, Doctor, there is a significant risk from asbestos exposure at below even one-tenth of a fiber per milliliter; isn't that right?

A. Yes.

Q. The exposure level, permissible exposure level, it 1985, 1986 was actually 2.0 fibers; isn't that right?

A. In 1985 it was 2.0. In 1986 it went to 0.2.

Q. It changed in the middle of the year?

A. Yes.

Q. Your exposure where there is a "significant risk" is actually what percent of what the Permissible Exposure Limit was in 1985 and 1986 or how many times smaller?

A. What I would call a significant risk?

Q. No. You have already said that you call one-tenth of a fiber per milliliter a significant risk.

A. Indeed.

Q. My question is, compare that to the 2.0 Permissible Exposure Limit that OSHA had in 1985 and part of 1986.

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A. That would be a working concentration 20 times higher.

Q. There is difference in the way radiation causes cancer as opposed to asbestos, isn't there?

A. Yes.

Q. Because radiation is an ionizing particle?

A. Yes.

Q. Which means you can get the cancer a lot sooner?

A. There are delays in the progression of cancer from ionizing radiation as well as from asbestos. I can't -- I don't know the exact time course of radiation so the answer may be yes, may be no. I am not sure. Certainly risks exist decades after exposure and occur decades after exposure as they do with asbestos.

Q. Do you agree, Doctor, that asbestosis is necessary before you can relate a lung cancer to asbestos exposure, underlying asbestos?

A. I believe that one can develop a lung cancer from asbestos exposure without having manifestations of asbestosis characteristic of x-ray readings of 1/1 or even 1/9. You have to define the term "asbestosis."

Q. 1/1 reading on a chest x-ray?

A. One can have -- I certainly believe that one can develop a lung cancer, asbestos-related lung cancer, without such a reading occurring.

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Q. But you know of doctors Hughes and Weil, don't you, know of them?

A. Yes.

Q. They are leading researchers in the field of asbestos medicine?

A. They conduct research in that area.

Q. They did a study published in the British Journal of Industrial Medicine?

A. Yes.

Q. In that they concluded that asbestosis had to be found before you could conclude that the lung cancer was due to asbestos exposure, and you just disagree with that, I take it?

A. There is differences in the two questions. One has other -- can I --

Q. My question is, do you agree with that statement or not, yes or no?

A. I don't know without looking at data. I do know that one has studies showing --

Q. Isn't it true that they looked at x-ray data and that they didn't find any -- where they did not find evidence of asbestosis, they found no statistically significant increase in lung cancer?

A. They may have done so. Others have found the opposite.

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Q. If you don't have asbestosis, that indicates that your exposure to asbestos was low?

A. Yes, but I am just stating that other studies have shown the opposite.

Q. The opposite they --

A. No. That there was excess lung cancer in people without asbestosis, and my statement that that is the case prior to your reading the results of Hughes and Weil. Notwithstanding, my answer stands.

Q. It is true, isn't it, Doctor, that if you have asbestosis, it is more likely than not that your exposure was higher than someone without asbestosis?

A. On a probablistic basis, yes.

Q. The risk of lung cancer goes down once you stop your asbestos exposure?

A. No. The relative risk does not go down for lung cancer.

Q. Page 128, from the same deposition two months ago:

"Q. I am asking you, Doctor, whether or not that was not a theory with some currency in the '70s" -- let me start sooner. Line 7:

"Q. Doctor, am I correct that at least in the 1970s

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there was a theory that if one reduced but did not eliminate asbestos exposure in occupational settings and elsewhere that you might eliminate any increase in risk attributable to those exposures by reducing the latency period for the disease to a point where it was beyond the normal lifetime of the people exposed?

"A. Reducing the latency period?

"Q. Excuse me, extending the latency period. Excuse me, Doctor.

"A. How do you do that?

Q. I am asking you, Doctor, whether or not that was not a theory with some currency in the '70s, in fact, discussed in some of Mount Sinai's own writings with respect to research that was undertaken?

"A. Firstly --

"Q. Can you answer yes or no, Doctor?

"A. You are -- you had a very complicated question that was erroneous in its assumptions in that there would be a reduction in the risk following cessation of asbestos exposure for, in this case, lung cancer, I

believe is what you would be speaking of." Was that your answer, Doctor?

A. I guess it was and that is exactly what I said just now. You don't reduce the risk -- the magnitude of the relative risk is how it is expressed with cessation of exposure. That is what I am saying there.

Q. You have talked a lot about Dr. Selikoff. You

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are aware of his report in 1990, The Third Wave of Asbestos Disease Exposure to Asbestos in the Workplace."

A. Yes.

Q. Doctor, didn't Dr. Selikoff say, "We, therefore, calculated expected and observed deaths for each of the three periods of time separately taking into account age specific deaths rates for each of the three periods. The data is graphically displayed in figures 8 through 15. In summary, they demonstrate that even after 15, 20, 25 years of work exposure reduction of exposure resulted in decreased rates of death from lung cancer, peritoneal mesothelioma and asbestosis. Such an advantage, however, was not seen among those who had already gone 40, 45, 50 years from onset of their work. Apparently, after this amount of exposure and passage of time, the risk is irreversible." Do you agree with that statement, yes or no?

A. I agree with the statement that if you reduce exposure that group with the reduced exposure will have less of

a risk than a group that continues that exposure because it has lesser exposure.

Q. Exactly, but yesterday you kept saying to this

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jury that your risk keeps going up after you have been exposed, but in fact the only thing that is happening is, the latency period is running, your risk isn't going up. Yes, a year after you have been exposed your risk is lower than 30 years but it is not because it is dangerous to stop your exposure.

A. It is beneficial to stop the exposure. But the lung cancer risk is one that is described by a multiplier on the underlying risks of lung cancer. That is going to rise. The multiplier stays the same, but the extra lung cancers that come from asbestos in fact increase with time, even though there is no greater exposure.

MR. GOETSCH: Move to strike as not responsive.

Q. Doctor, you don't remember the particular work you actually did with respect to the insulation work on the ships, do you?

A. we were in one shipyard we visited. But one shipyard allowed us to --

Q. Not "we." You. You. Dr. Nicholson, do you remember the work you did?

A. I visited a lot of ships in a lot of shipyards.

Q. But you don't remember specifically what you did, do you, in terms of that survey of insulation workers. Do you? Yes or no.

A. Yes, I remember what we did.

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THE COURT: Not what "we" did. Only judges and kings can say "we." I get offended when you say "we." You.

A. I remember what I did.

Q. Reading from your deposition two months ago, on page 153:

"Q. And with respect to those two yards, can you tell me whether you have any specific recollection of going aboard a ship and observing any asbestos exposure practices on board ships at either of those yards. Long Beach or Pascagoula." Am I pronouncing it correctly?

A. Pascagoula, yes.

Q. Pascagoula.

"A. I believe so at Pascagoula.

"Q. But you can't make the same statement with respect to Long Beach; is that correct?

"A. At the moment I don't have an image of a Long Beach shipyard in my mind, that's true."

A. Oh, I am mistaken. I have a minimum knowledge of the Long Beach shipyard. I don't recall going aboard a ship at Long Beach. To that extent I may have disanswered.

Q. It says -- let me read there.

A. It is totally inadvertent, if that is the case.

Q. Let me just finish. I think the answer says: "At the moment I don't have an image of Long Beach shipyard in my mind, that's true."

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A. It may have been --

Q. Continuing on page 154.

"Q. With respect to Pascagoula, what if anything do you recall about any ship that you may have gone aboard there and anything that was occurring on the ship?

"A. As to a specific work practice?

"Q. Any work practices.

"A. We would have looked at some insulation. I don't remember the particular jobs or those details.

"Q. Do you remember the type of work that --

"A. Insulation work.

"Q. In what circumstances?

"A. In the engine room.

"Q. You are sure you were in the engine room on the ship at Pascagoula?

"A. I believe so, but I'm not sure.

"Q. You're not sure. Do you know if work was going on in the engine room on the ship in Pascagoula if you were in it?

"A. It's my recollection it was; that's why we went.

"Q. Do you remember what kind of work was being done in the engine room?"

Continued on page 155.

"A. No.

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"Q. Now, Doctor, we are talking about a single ship or more than one ship in Pascagoula?

"A. I don't remember.

"Q. OK. Do you have any recollections with respect to any other shipyards or ships that you were on where you recall anything specifically about observing any work practices related to the application of asbestos? Other

than what you have already referred to with respect to Pascagoula.

"A. I know I went to the Plymouth shipyard in England with Peter Harries. I don't remember the details of any visit that we might have had within the yard again.

"Q. Do you have any other recollections?

"A. Not 25 years later.

"Q. My question was not limited to 25 years ago. It was at any point in time. Do you have any other recollections?

"A. We were looking at shipyards 25 years ago.

"Q. Have you looked at shipyards since that period, 1969 to 1972? You personally.

"A. I don't believe so."

Q. Continuing on page 156.

"Q Now, you mentioned a few minutes ago making measurements. Did I understand you to be referring to measurements that were made by you at shipyards?

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"A. I didn't make specific measurements. I know Reitze did.

"Q. Did you ever make any measurements yourself at shipyards?

"A. I said no.

"Q. Did you supervise the collection of any exposure measurements at any shipyards ever?

"A. Again, I don't remember what I supervised or not. I watched a lot of what Reitze did. I participated in much of the sampling that he did. And it was in many installations. When you look at a lot of installations, the recollection of a specific instance 25 years later is vague.

"Q. Tell me what you recall of what you observed of any work by Reitze in measuring asbestos exposure in any shipyards?

"A. I don't recall.

"Q. You have no recollection of any of that?

"A. Of him -- I don't recall being there when he was doing measurements. I do have a strong recollection of his" -- his -- "having made such measurements.

"Q. With respect to the measurement made by -- is it Mr. or Dr. Reitze?

"A. Mr. Reitze.

"Q. Mr. Reitze. -- did you have any involvement

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in designing the sampling that he did undertake in any shipyards?

"A. You wouldn't design a sampling strategy to take counts here, counts there, counts there."

THE COURT: What question are you going to ask?

MR. LANDMAN: The witness claimed that he had a recollection of doing this work himself, and this obviously --

THE COURT: This shipyard, what does this have to do with this case?

MR. LANDMAN: Well, because it is the basis, it is the studies of the shipyards, your Honor, the insulators, that leads to the opinions he has in this case.

THE WITNESS: No, it is not. The shipyards, as I stated all along, were visited. The data that we collected and the data that was presented were collected in largely land-based centers. I believe there were measurements made at Pascagoula. That is the only shipyard where I have that recollection.

MR. LANDMAN: Well, your Honor --

THE WITNESS: So the shipyard --

MR. LANDMAN: One of the sources he relied upon is with respect to dust concentrations in shipyard insulators. I will move on now.

Q. Doctor, you think that the most overwhelming

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activity going on in a shipyard with respect to insulators was either the application or the removal of pipe covering, is that true?

A. It's largely the application in most circumstances in recent years.

Q. Did Mr. Buckley ever apply insulation containing asbestos material? Ever, from 1985 to 1988?

A. I don't believe he did. He may have done a little bit, but that was not his major activity.

Q. And he never did any cement mixing with asbestos containing materials such as insulators, did he?

A. That's my belief.

Q. Asbestos dust for insulators was less in asbestos dust in the textile factories, isn't that right?

A. On average, in insulation application, compared to textile factories in the '40s and '50s, yes. It depends upon the time of the textile factories because they could control and did control in recent years to levels that were lower than the averages we have been talking about for standard insulation work.

Q. As far as the insulators you studied, you had no knowledge of how long the insulators you studied had performed a certain activity that was sampled, or what percent of the workday was spent doing that kind of work, or what was the area actually being sampled, isn't that right, Doctor?

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A. We made estimates of the time that they spent doing different activities, both by observation and questionnaires. We would sample a job over the course of the job, or we would sample a peak, depending upon exposure, for example, during the mixing of asbestos. So the times of sampling were recorded.

Q. On page 202 of your deposition of two months ago.

"Q. Now, Doctor, would I be correct in assuming that you have no knowledge of how long the insulators studied here performed the activity that was sampled, that is, what percentage of their workday was spent doing the kind of work that was sampled here?

"A. I stated I did not have that direct information.

"Q. And I take it that from that absence of information you are not able to glean from this data anything about the time weighted average exposure of the insulators whose exposures were reported here?

"A. Not from that particular data. But we have done so from the collection of a lot of other data." Was that your answer?

A. Apparently that is what is stated. Would you read the preface to that, so people can understand what you might be talking about, including me, or what I might be talking about in that case?

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Q. Do you remember what you were talking about two months ago when you gave this deposition?

A. Not in that deposition for the length of it.

Q. We will move on.

A. No, you are leaving it totally unclear.

Q. Counsel can ask you about that on redirect. It is a tribal custom and we need to get done.

A. You could be referring at that point to somebody else's data. It could be anything. So the question without basis, that you asked without the basis, is totally irrelevant.

How many subjects, Doctor, in the workplace does OSHA regulate?

A. I don't know, but a lot.

Q. Hundreds?

A. Yes.

Q. And each of those you believe causes some increased risk of cancer, isn't that right?

A. Not necessarily.

Q. Why does OSHA regulate that?

A. Because they could be producing other disease.

Q. I am sorry, they each produce increased risk of disease.

THE COURT: Of some disease.

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Q. Any disease.

A. Largely so. I am not going to make an absolute statement, but that is the point of their regulations.

Q. Did you tell Mr. Buckley to not smoke when you saw him in February 1994?

A. He wasn't smoking at that point, to my recollection. He stopped smoking in 1991, and I probably, I would hope, being apprised of that, encouraged him to keep it up.

Q. You encouraged him?

A. I would think I did. I can't state for certain I did, but I would imagine I would.

Q. Doctor, when did you find out that he was smoking one cigarette a day?

A. Just recently.

Q. From whom?

A. I believe it was from Mr. Goetsch.

Q. Was it yesterday you found that out?

A. No.

Q. Tell us when.

A. It had to be at least a week ago. I spoke with Mr. Goetsch sometime, I believe, sometime last week, but the time scale without my calendar is uncertain. But my recollection is that it was sometime more than a week ago or approximately a week ago.

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Q. Was that by telephone or did you have a meeting?

A. We met.

Q. At your office?

A. Yes.

Q. How many hours so far, through now, have you spent on this case, meetings, interviews, research, writing reports?

A. I remember, through July, various activities, something of the order of 20 hours.

Q. How many?

A. 20 hours as of sometime --

Q. In July.

A. July, September, thereabouts.

Q. Was that before or after you went to Grand Central Terminal?

A. It included going to Grand Central Terminal.

Q. And how many hours have you spent since then?

A. I haven't totaled it up. I would imagine, with the preparation for this particular trial, of the order of ten.

Q. You met with Mr. Goetsch for how long?

A. Less than an hour, about one hour.

Q. And then you reviewed your material?

A. Yes.

Q. So that is about ten hours?

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A. And producing graphs and looking at various documents that have been produced.

Q. And yesterday how many hours are you charging to this case?

A. I was in the trial from 2 to 4:30: two and a half hours.

Q. You don't charge for the time from when you leave your office?

A. No, I don't. I might charge for wasted time in travel. I don't know about here doing so, because I only came down in the subway and that is less than half an hour. I may or may not. But I charged --

THE COURT: Once you get in the subway, God knows how long it will take.

THE WITNESS: I know. The time that I do something, or else am unable to do something else.

Q. You still charge $250 an hour, is that right?

A. For trial deposition and cases that arose prior to this year. I have raised the -- I have just raised rates for new activities to $275 an hour.

Q. You were charging $250 an hour back in 1985 and 1986 for depositions, weren't you?

A. I don't recall. At some times I was charging at -- at some times I was charging $200. I don't remember the time scale back in the past.

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Q How many depositions have you given, Doctor, since you got to Mount Sinai?

A. 20 to 30 perhaps, probably closer to 30. It would be closer to 30.

Q. How many times have you testified in court?

A. I looked at a list I had that went from -- that covered the last five years, and it was virtually the totality of the personal injury cases and that came to 15. I had been involved in trials involving governmental activities relating to --

Q No, I am just limiting it to personal injury cases.

A. OK.

Q. So the last --

A. Ballpark, 15.

Q. Doctor, you agree that between a half and a third of all cigarette smokers will die because of their smoking?

A. Not quite. Half to a third of the heavy smokers. A cigarette-a-day person would not. It depends on your population smoking habits at any one point of time, but it is certainly possible with a fairly heavy smoking load. And most of that is cardiovascular deaths, not cancer deaths.

Q. Death is death, right?

A. Of course. I am not arguing at all. I am just

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making it clear that there is a lot more risk to cigarette smoking than cancer.

Q. Doctor, I am not taking this paper out of the air. It is in the paper by Richard Doll and Richard Peto, "Mortality in relation to smoking: twenty years' observations on male British doctors," isn't it?

A. It could be. And you again are looking at a different period of time, and a different degree of smoking and different types of cigarettes. So I am not disagreeing with that as being possible. I am only saying it may be changed at this time.

Q. What they state is these ratios suggest between a half and third of all cigarette smokers will die because of their smoking if the excess death rates are actually caused by smoking. They say that, right?

A. I imagine so. I accept your reading of it.

Q. And in fact you accept the article because, Doctor, this is your file, right?

A. Yes.

Q. And you have that article in your file, right?

A. Yes, and I referred to that article. I just don't recall every word of it.

Q. Doctor, you mentioned something that I think is very interesting about smoking: that it depends on the type of cigarettes that are being used and filter and, for example, it depends whether they are a hundred milliliters long or whether they are king size or regular, right?

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A. To some extent, yes.

Q. And in fact cigarette companies, some, used to put asbestos in the filters, didn't they?

A. Yes.

Q. Doctor, normally when you do these epidemiological studies where you people go out and do these interviews and everything, they ask about what kind of cigarettes you smoke, they ask whether they had filters, they ask whether they were king sized or 100 milliliter cigarettes, don't they?

A. Probably more often than not. I won't say they do that all the time.

Q. But they do that, you so testified?

A. I would hope so.

Q. Doctor, you don't have any of that information from Mr. Buckley, do you?

A. I don't recall it at this time. With respect to his previous smoking, no.

Q. You did go back and you did find the reference that Mr. Buckley at times would smoke less than a pack a week, is that right?

A. That's what he stated.

Q. And the source of that was solely Mr. Buckley, is that right?

[453]

A. Yes.

Q. Doctor, you are aware of studies that have shown that people underreport their smoking?

A. That can occur, yes.

Q. But you just assumed that Mr. Buckley's history was accurate, is that right?

A. It certainly was sufficiently accurate for any comparison of lung cancer risk with other risks that would involve the asbestos component of his risk.

Q. Doctor, in addition to cigarette filters having asbestos in them, they put asbestos in beer filters, didn't they?

A. I believe that is correct.

Q. And they also put them in hair dryers?

A. In the insulation of hair dryers. It was an asbestos cardboard.

Q. And that is one of the things you actually studied, isn't that right?

A. Yes. Some release of fibers occurred in some circumstances.

Q. Doctor, we talked a little bit about Dr. Balzer yesterday. You told us who he was. You in fact have in this file on the Buckley case a whole folder of Balzer Cooper articles, isn't that right? I think it is four, is that right?

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A. Yes. I pulled, just to take with me, various insulation-related articles in my insulation file.

Q. So you --

A. I certainly read Mr. Balzer's' articles.

Q. Doctor, you mention a lot about the Harrie study that you relied on, isn't that right?

A. It had the most data relevant to removal of asbestos.

Q. But didn't it relate, Doctor, to dust concentrations during removal of sprayed Chrysolite asbestos?

A. I did not utilize that information. That is another story in itself. I only referred in this case to -- I believe it is the second page-long table of approximately 30 to 40 fiber counts made during removal of thermal insulation. He also in another article refers to roughly 150 such counts.

Q. Do you know whether the pipe lagging that you referred to, the study of that, whether that actually contained crocidolite? You don't know the content from this article, do you?

A. It may have contained very much, and it wouldn't

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matter too much because we are looking at air concentrations, and the amount at least would be similar. But crocidolite rarely is used in insulation because of the asbestos varieties. It is the least resistant to heat.

Q. In fact they find a fair amount of crocidolite in table 1, is that right?

A. Well, the sprayed stuff was crocidolite, sprayed on the decking, pure crocidolite.

Q. The insulation workers wouldn't have been exposed to?

A. Yes, in Britain they could have been exposed to, and in some cases in the United States, if they worked on British ships.

Q. But we didn't use much crocidolite in this country?

A. In thermal insulation, that's correct, or sprayed insulation.

Q. Doctor, actually, in the article that you have written on the TLV approach, which is one of the articles, one of the four things you are relying on for your opinion in this case, you actually cite Dr. Balzer's studies a couple of times, don't you?

A. Yes.

Q. Doctor, haven't you recently written an article on Chrysotile?

A. Yes.

Q. Doctor, in that, you again cite Dr. Balzer as one

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of your sources, isn't that right?

A. I would cite him for some exposure measurements in insulation work, which -- oh, I know, I am sorry, yes. In the article on Chrysolite --

Q. I want to know --

A. Wait a minute.

Q. Quickly: Did you cite him?

A. Yes, I did, because he had data on time of exposure.

Q. So you think he is a pretty reliable source for information? I mean, you have cited him in your articles?

A. I think his articles are a reasonable source for information. They certainly should be considered. One has to, in some cases, take into account the circumstances of his measurements being in California where you don't have the close structures that you have in the Northeast as much.

Q. The Harrie study again, the majority of workers had worked with or near asbestos for more than 20 years, isn't that the result?

A. I don't recall the data on his clinical survey. I mean, he published data on clinical findings of workers. I

was only referring to exposure measurements that were reported. I am sorry, I just have no recollection of the work histories of the people he may have discussed.

Q. Reading from Harrie's article on "The Radio-

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logical Survey of Men Exposed to Asbestos in Naval Dock Yards," at page 278: "The high rates at Devonport" -- that is a shipyard that you were studying?

A. Yes.

Q. "may be the result of the type of refitting work involving the larger aircraft carriers at that yard, while the low rates at Rosyth are probably related to the small number of extensive refitting of surface ships undertaken there in the last 25 years." Would you agree with that?

A. That sounds like a very reasonable statement, the removal of areas of sprayed crocidolite was remarkable, which is what they were doing there.

Q. Also in this study it states, at page 278: "The Devonport study showed that there was a long interval between first exposure to asbestos and the radiographic asbestos abnormalities, and time similar results were seen in the other three yards. In 54, or 78 percent of the affected men, more than 25 years had elapsed since their first exposure to asbestos and 67 percent had worked with or near asbestos for 25 years or more. Their overall prevalence of asbestos

abnormalities for men with more than 25 years since first exposure to asbestos was 8.1 percent. The rate was higher in Devonport but similar in the other three yards."

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So you agree with me that they were studying people with more than 25 years of exposure, on the average?

A. Well, he is saying that those that developed abnormalities particularly put in more years.

Q. 25.

A. 25. It can occur earlier in some, but at the concentrations we are talking about, typically more than 20 years will elapse before abnormalities develop.

Q. But, Doctor, what I read to you also said that the people they were studying had more than 25 years of exposure. Do you agree or not?

A. It was not clear from your reading that all people were, but let's say that most were.

Q. This is a study you relied on. You only relied on four studies.

A. I didn't --

Q. It is in your file, right?

A. It is in my file, but I referred in no way to that study of radiological abnormalities to do anything in this

case. I haven't looked at that particular article for ages.

Q. Why did you bring it?

A. It happened to be in a file listed Harries, and I brought Harries' paper there, keeping the whole file. It was easier to bring all four or five articles than separate it and probably have it separated for some time thereafter.

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Q. But the study that you are referring to was a study of this same shipyard, isn't that right?

A. That's correct.

Q. And what it says is that 67 percent of the men had worked with or near asbestos for 25 years or more.

A. OK. I will agree with that. 30 percent worked for less. But that has no bearing on anything that I did in this case.

Q. You also have Dr. Balzer's study, "Asbestosis in the Manufacture of Insulating Materials," by -- I am sorry not Dr. Balzer; his colleagues, Dr.Cooper and Dr. Miedema. And in that the conclusion is: "Studies of workers involved in the application of insulation have been consistent in showing a high rate of occurrence for asbestosis and persons exposed to insulating materials containing chrysotile, amosite or crocidolite. Values for the average dust concentration that are associated with the production of disease are not reliable because of changing products in alterations

between brief periods of high exposure in sawing, mixing mud, tear out, and periods of relatively low exposure. These uncertainties make comparisons among different types of asbestos end products impossible. Studies of workers involved in the manufacture of insulation materials are more likely to reveal significant relationships between dose and response, but there is no published information which permits the evaluation of relative hazards in terms of asbestosis. Consideration should be given in both epidemiological studies and studies in animals to the pathogenic contribution of the materials which accompany asbestos in insulation products, such as magnesium carbonate, calcium silicate, and diatomaceous earth" --

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A. Diatomaceous earth.

Q. Thank you. -- "which may modify the fibrotic response." Do you agree with that?

A. Not completely. I think one can make comparisons between insulator studies and other studies with the information that is available. There are uncertainties involved. I have done so with respect to malignancy, and it is reported in the document to the EPA.

With respect to radiological changes, which you are referring to, I don't know that it is being done. The comparison of establishing dose responses for radiological abnormalities is much more difficult than for cancer, because of the ambiguities of different readers and the ambiguity of the effect.

Q. Doctor, you cited this study in some other articles you published, haven't you?

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A. Not the one -- I may have cited Balzer Miedema. I don't remember where. I didn't consider that study, because it again was radiological changes in this particular case.

Q. Doctor, you agree that the earlier studies may have to be modified because the asbestos composition in insulating products has changed, even those that contain asbestos material, in that insulation blocks may have twice the asbestos content in the early years than in the more recent years up until asbestos wasn't used any more?

A. That is my understanding. In trying to make these comparisons, I utilized such information.

Q. How have you done that?

A. I assigned higher exposure, in looking at those response relationships, for insulators, would assign a higher exposure in the '60s and '50s than in the -- well, in the '50s and '40s than in the late '60s and certainly in the '70s. I someplace have a graph of that. In fact, it is in the material you have. Not a graph; a tape.

Q. You haven't shown us that yet. We haven't gotten to that.

A. No.

Q. Doctor, you have stated before, haven't you, that from 1940 to 1979, 27,500,000 individuals had potential asbestos exposure at work. Of these, 18,800 had exposure in excess of that equivalent to two months employment in primary manufacturing or as an insulator. 21 million of the 27,500,000 and 14,100,000 of the 18,800 are estimated to have been alive on January 1, 1980.

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Then you conclude: It is further estimated that approximately 8,200 asbestos-related cancer deaths are now occurring annually, and you say this will rise to about 9,700 by the year 2000. Is that right?

A. Yes. That is a paper I wrote in 1982.

Q. Do you still agree with that?

A. Largely so. The number might be a little bit less, but it is ambiguous because of the uncertainties of the mesothelioma registry the United States maintains. There could be many miscast cases there.

Q. And you are saying there will be asbestos-related cases of 9,700 by the year 2000. How many cancer-related deaths in general will there be in the year 2000?

A. That is cancer deaths.

Q. From smoking --

A. I am sorry.

Q. -- from smoking from radon, from benzene, from chemicals, from chloride, from solvents, the aging process and everything.

A. Yes, I know. I am sorry, I don't have that number on hand. I think on males, which is what we are talking about here, it might be a couple of hundred thousand.

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Q. A couple of hundred thousand people will die every year of cancer?

A. I believe that -- I think a million people die each year, and roughly 20 percent of the deaths are of cancer, so we are looking at 10,000 out of ballpark 200,000. It might be now 225,000.

Q. Right, because there are more people.

A. Yes. So I am not giving you the latest data, but that is my estimate of it.

Q. What are the assumptions -- you mentioned this yesterday -- that you had some assumptions that Dr. Balzer made that you disagree with. What are they?

A. In what respect?

Q. This was on a question Mr. Goetsch asked you and you said that you looked at Dr. Balzer's report in this case and you disagreed with some of his assumptions?

A. Oh, yes. I mean, it was mentioned that he had been provided information, presumably to counsel with whom he was discussing the case, and I don't know

where the information came from, but he was stating that Mr. Buckley rarely was exposed to asbestos and, when exposed, it would be occasionally, very infrequently, to low-exposure levels.

Q. That is the assumption you disagree with?

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A. That is completely negated by what Mr. Buckley states his activities in fact were.

Q. So basically you are relying on what Mr. Buckley told you?

A. Far far more than what Mr. Balzer was writing in some submission in this case. I don't remember to whom.

Q. Did Mr. Buckley have any responsibility to inspect fire extinguishers?

A. I don't recall. I don't believe so.

Q. Did he have any responsibility to fix pipes in bathrooms and things like that?

Q. He did at one time --

Q. No, 1985 to 1988.

A. In that period of time it would have been a very minor aspect of his activity, to my understanding.

Q. Based upon what he told you.

A. That's correct. He was replacing pipes but they were pipes -- seven hours a day he was doing pipe fitting work.

Q That is what he told you.

A. Yes. Roughly speaking.

Q. Fine, and that is what you relied on in rendering your opinion?

A. And that one hour a day -- it didn't matter

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what else he was doing over the other part of the day, but nearly every day, I was led to understand, he was banging, cutting, going at it with that ax, to remove asbestos from steam pipes in the tunnels.

Q. By the way, you had a scholarship or a fellowship from the Atomic Energy Commission?

A. I had a fellowship.

Q. When was that?

A. In 1955.

Q. What was that to study?

A. To study radiation effects, which I did at the University of Washington.

Q. Radiation effects on humans?

A. Well, it involved measurements, it involved human studies to some extent.

Q. Weren't you trying to figure out what exposure the soldiers had had at the test site as part of that study?

A. I was not doing that. I did not have information of any individual exposure measurements other than my own. I was aware of measurements made on planes, and I went to Washington contemplating doing research in radiation effects. I ended up spending more time doing physics.

Q. Just so it is clear, your CV states that from 1952 to 1955 you developed instrumentation for studies of ionizing radiation effects. Yes or no.

A. Yes. That's to measure ionizing radiation

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quantities and they can be related to effects studied by others. I was not doing animal experiments or human studies in the Air Force.

Q. But you knew about the experiments?

A. I knew about some.

Q. And, Doctor, the Atomic Energy Commission back at that time actually controlled the use of nuclear weapons in this country, isn't that right, until it went over to the Department of Energy?

A. That's correct.

Q. And they are the ones that gave you the grant?

A. One arm of it did. Not the one having to do with weapons.

Q. What arm?

A. An educational one. They were wanting people to be knowledgeable about radiation effects so they could become anywhere from researchers to measurers, you know, radiation control officers in a plant.

Q. Doctor, are you familiar with the OSHA small-scale exception?

THE COURT: You have got three minutes it left.

MR. LANDMAN: I will finish. Thank you, your Honor.

Q. Are you familiar with the OSHA small-scale exception?

A. In what context?

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Q. In connection with the type of work that Mr. Buckley did.

A. No, I am not.

Q. Doctor, do you know Dr. Roggli, or know of Dr. Roggli?

A. Yes.

Q. And who is he?

A. He is a researcher at an institution in North Carolina, I believe.

Q. What is his research on?

A. He has, I guess, a variety of things. I know he has done some asbestos research.

Q. Doctor, hasn't he in fact written a textbook on "Pathology of Asbestos-Associated Diseases"?

A. Obviously he has.

Q. Have you ever seen this before? Isn't this in the Mount Sinai library?

A. It probably is.

Q. And Dr. Roggli is professor of pathology at Duke University School of Medicine?

A. Yes.

Q. You have never written a textbook on asbestos medicine, have you, or asbestos diseases?

A. No, I have not.

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Q. Do you agree with Dr. Roggli when he states: "Some studies" -- at page 193 -- "have indicated that the risk of developing lung cancer in a ex-smoker is still greater than that of a lifelong nonsmoker, even 20

more years after cessation of smoking"? After they stop smoking.

A. Yes, I agree with that, and indeed took it into account in that chart that you decided to enter into --

THE COURT: Having agreed on something, let's adjourn for lunch.

MR. LANDMAN: Your Honor, one more question and we can be done with it. I guess you have redirect anyway.

MR. GOETSCH: Why don't you ask the question and you finish with the doctor.

Q. Doctor, isn't what you are doing here for Mr. Buckley fraught with difficulties because it depends upon individual sensitivity and uncertainties about the duration and extent of this individual exposure?

A. There are certainly uncertainties --

Q. Yes or no. Yes or no.

A. There are some uncertainties.

MR. LANDMAN: Why don't we take a break. I will have two minutes when we come back. I don't want to hold up the jury and you, your Honor. That is fine.

THE COURT: You were granted this time.

MR. LANDMAN: I can do it, your Honor. I just didn't want to keep everyone waiting.

MR. GOETSCH: I have two minutes.

MR. LANDMAN: One minute.

Q. On page 440 of that same deposition --

THE COURT: We are talking about the deposition --

MR. LANDMAN: -- that was taken two months ago in Baltimore, yes, the Baltimore shipyard.

THE COURT: All right.

"Q. But are you able under any circumstances to take B reading values and come up with a scientifically based estimate of the range of time weighted average exposure associated with the particular x-ray readings? In other words, if you have a series of x-ray readings, can you say, OK, I can say with reasonable scientific certainty that the time weighted average exposure was between A and B?

"A. It is very difficult to do that for an individual. One can make some estimates if one has a population and looks at the results of the total population. That is a more meaningful exercise, in that there are data and again it has to be considered in terms of the duration of exposure of the individual that do relate population exposure to the degree of abnormality 20 or 30 years later. So, on a population basis, some estimates could be made. On an individual, it is fraught with difficulties because it depends upon individual sensitivity

and the uncertainties of the time course of the individual's exposure." That was your testimony two months ago?

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A. That is correct, in relationship to relating asbestosis manifestation and exposure.

EXCERPT OF TRIAL TRANSCRIPT OF FEBRUARY 13 AND FEBRUARY 14, 1995 - TETIMONY OF MICHAEL BUCKLEY

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MICHAEL JOSEPH BUCKLEY, called as a witness by the Plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GOETSCH:

Q. What is your occupation, Mr. Buckley?

A. I work for Metro-North Railroad. I am a pipefitter plumber. I am also an emergency medical technician. I am also a volunteer firefighter which I hold the rank of lieutenant.

Q. When did you volunteer to become an emergency medical technician?

A. The date you said before, 1988, wasn't true. I completed my test and certification in 1993.

Q. How much training did you undergo for that position?

A. The original course was 6-1/2 months. I had another course that was another three and a half weeks.

Q. What are your responsibilities as an emergency medical technician at Grand Central?

A. We carry radios and if there is a medical emergency with either an employee, a contractor or a customer within Grand Central Terminal, we are called on the

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radio to respond to the medical emergency.

Q. Do you receive any additional pay for that work?

A. No, I do not, sir.

Q. When did you become a volunteer fireman for Metro-North?

A. I believe it was 1988 they started the fire brigade.

Q. When did you undergo any training regarding hazardous materials?

A. The first time we actually received any formal training, I believe it was in 1993 at the Valhalla Fire Academy in Westchester.

Q. What are your responsibilities as a volunteer lieutenant fireman at Grand Central Terminal?

A. Also we carry radios and respond to fires or hazardous situations within Grand Central Terminal.

Q. Do you receive any extra pay for that work?

A. No, I do not.

Q. What is your date of birth?

A. 5/22/54.

Q. Whereabouts were you raised?

A. Brooklyn, New York.

Q. What was your father's occupation?

A. My father was a locomotive engineer for Metro-North.

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Q. How old is your father?

A. My father, I believe, is 72.

Q. He is still alive?

A. Yes, he is.

Q. Is your mother still alive?

A. Yes, she is, thank you.

Q. How old is she?

A. My mother is 70.

Q. Do you have any brothers or sisters?

A. Yes, I do.

Q. How many do you have?

A. Altogether there was five boys and two girls in my family.

Q. Are all your siblings still living?

A. Yes, they are.

Q. Whereabouts were you educated, Mr. Buckley?

A. I went to grammar school, Saint Jerome's in Brooklyn.

Q. Where did you go after that?

A. I went to Erasmus Hall high school. I did not graduate.

Q. At what point did you leave high school?

A. It was towards the end of my second year.

Q. Why did you leave high school?

A. We had money problems in my family.

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MR. LANDMAN: Objection. Is that relevant, why he left?

THE COURT: It is part of his background.

THE WITNESS: We had money problems in my family. I came from a large family and I went to work.

Q. Have you received any vocational training?

A. Not official vocational training, no.

Q. What training did you receive?

A. There was a course they were giving at a local high school for plumbing and I attended a few classes.

Q. As a youngster did you have any health problems?

A. No, I did not.

Q. Were you physically active?

A. Yes, I was.

Q. What type of things would you do as a youngste

A. Normal things boys would do; basketball, football, baseball.

Q. How about hobbies; did you have any hobbies?

A. Collecting baseball cards, model planes, things like that.

Q. As you were growing up did you have any accidents or injuries?

A. Just your regular accidents growing up; falling down, scraping your knees, banging your elbows.

Q. Did you have any medical treatment for your

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lungs?

A. No, I did not.

Q. Any problems with breathing or asthma?

A. No, sir.

Q. Does anyone in your immediate family have a history of lung disease?

A. They do not.

Q. while you were growing up was there any asbestos in your home as far as you know?

A. Not that I know of, sir.

Q. Are you married, Mr. Buckley?

A. Yes, I am.

Q. what is your wife's name?

A. Deidre.

Q. When did you first meet your wife, Deidre?

A. 1988.

Q. Do you have any children?

A. Yes, I do.

Q. what are their names and ages?

A. We just had our first boy, his name is Daniel Patrick. He was born eight months ago.

Q. While you were a youngster in high school, did you have any jobs?

A. Yes, I did.

Q. What type of things did you do?

[690]

A. I worked at the local MacDonald's. I worked on weekends. I would help out a local contractor. Just small labor work we used to do.

Q. Did there come a time when you began working for the railroad?

A. Yes, there did.

Q. What railroad was that?

A. Penn Central Railroad.

Q. What day was that?

A. That was May 22, 1973.

Q. How old were you at the time?

A. I believe I was 19.

Q. What job did you begin working on the railroad?

A. I started as a carpenter.

Q. Whereabouts did you work as a carpenter?

A. I started out in Stamford, Connecticut.

Q. What type of things would you do as a carpenter in Stamford, Connecticut?

A. Install windows, loose floor boarding, railroad ties we used to install on bridges.

Q. Any exposure to insulation or asbestos as far as you know?

A. Not that I know; no, sir.

Q. What was your next job after the carpenter job?

A. I got a job on the west side of Manhattan still

[691]

for Penn Central as a plumber.

Q. Is there any reason why you changed from a carpenter to a plumber?

A. I was always interested in plumbing work.

Q What type of work would you do in the West 60th Street yard?

A. Just small work; maintaining office building bathrooms, fixing toilets, sinks.

Q. As far as you know, did you have any exposure to asbestos during that job?

A. Not that I know; no, sir.

Q. After the plumber job, did you get another job on the railroad?

A. Yes. The West 60th Street yard eventually closed down and I went to the Oak Point yards in the South Bronx as a locomotive electrician.

Q. What type of work would you do up there?

A. I would inspect the locomotives daily.

Q. Did you do any work with brakes on locomotives?

A. No. That was the machinist's job. My electrical job was to make sure the lights, the cab signal which is a signal when the locomotive runs over a track, it tells you what signal is ahead of you.

Q. Any exposure to asbestos there as far as you know?

[692]

A. No, sir.

Q. Did there come a time when you began working for Metro-North Railroad?

A. Yes, there was.

Q. What date was that?

A. June of 1985.

Q. What position were you hired in?

A. As a pipefitter.

Q. What attracted you to become a pipefitter on Metro-North?

A. They finally -- they were hiring pipefitters, and like I expressed before, I was always interested in pipefitting and plumbing work.

Q. When you first started with Metro-North did they provide you with any type of training?

A. What type of training?

Q. Any safety instruction at all.

A. No, sir.

Q. Did they provide you with any protective clothing?

A. No. They gave us a hardhat and goggles the first day I started.

Q. That was it?

A. Yes, sir.

Q. Would you tell us the general nature of your

[693]

duties as a pipefitter at Grand Central from June of 1985 on through June of 1988?

A. On a regular basis we were sent out in the mornings. We would report for work at 8:00. By 10 after 8:00 we would leave the shop and go to various locations

throughout the Grand Central steam tunnels to perform our duties for the day.

Q. During that period of time, from June of 1985 to June of 188, where did you spend the majority of your time within the Grand Central Terminal area?

A. Mainly, we were down in the steam tunnels.

Q. Would you name the steam tunnels at Grand Central Terminal where you spent the majority of your time?

A. The west tunnel, the east tunnel, the connecting tunnel, the 48th Street connecting tunnel, 45th Street truck and subway, 43rd Street truck and subway, various locations underneath the platforms were also part of the steam bridge system.

Q. Were there any other areas within the larger Grand Central Terminal where you worked as a pipefitter as well?

A. Yes. The 43rd Street meter room, the 49th Street meter room, the service plant.

Q. The tunnels that you worked in, how would you describe their dimensions?

[694]

A. All of them were different sizes. The average size, like, for instance, the west tunnel has a ceiling height of maybe 15 feet and a width of maybe 20 feet.

Q. Back in the time period June of '85 to June of '88 which is what we are talking about what was the temperature like in the tunnel?

A. It was very hot.

Q. How hot was it?

A. I know one time we did get a thermometer and we checked and it was 135 degrees.

Q. Were there any pipes running through these tunnels where you worked?

A. Yes, there was, a lot of them.

Q. What kinds of pipes were running through the tunnels?

A. Mainly steam pipes but there were water pipes, electrical pipes and air lines also.

Q. What was the range of diameter of the pipes in the tunnels?

A. They went from the area of half inch up to 18. There were some locations where we did have 20-inch mains.

Q. Were those pipes in the tunnels insulated during '85-'88? .

A. Yes, they were.

Q. Do you now know what type of insulation covered

[695]

those pipes during that time period?

A. Yes, I do. It was asbestos.

Q. When were you informed that it was asbestos by Metro-North?

A. In the late part of 1987.

Q. During that time period from '85 to '88 were the tunnels in a clean or dirty condition?

A. They were dirty.

Q. How would you describe the condition of the asbestos insulation in the tunnels during that time period?

A. Some of it was still in tact and there was a lot of areas where it was broken off, mostly on elbows, around expansion joints where it had been repaired. A lot of it was broken off, hanging down. A lot of where you turned, mostly where you turned, were in disrepair.

Q. From '85 to June of '88 as a pipefitter did you work with any partners at Grand Central Terminal?

A. Yes, I did.

Q. when you worked with a partner, would you work alongside each other?

A. Yes.

Q. How many different pipefitters did you work with during that period?

A. Anybody that was in the pipe shop at the time, we all worked together at one time or another.

[696]

Q. Would you describe for us the type of jobs that you and your pipefitter partners performed in the steam tunnels in '85 through June of 1988?

A. Most of the work we were hired to do at the time was capital improvement work. The tunnels were in such disrepair that at the time they hired us we were doing a lot of demolition work and renewing a lot of pipes.

Q. What areas of the pipes would you do jobs on?

A. Mostly we would change the valves, the expansion joints, the elbows; wherever there was a leak or they were changing the system to a different size line or relocating a line.

Q. Are you familiar with the terms "trap" and "free blow?"

A. Yes, I am.

Q. What do they mean?

A. A trap is a device put into the steam system that collects water, condensated water, and a free blow is a valve that is on a bigger line, that when you are shutting the system down that is where you release the pressure from, from the free blow.

Q. During this period did you ever perform an inspection in the pipe tunnels?

A. Yes, I did.

Q. How would you go about inspecting the pipes in

[697]

the pipe tunnel?

A. We would walk through and look for leaks, look for broken handles on pipes, we would check the traps to see if the traps were in operating condition. This was done when we weren't doing maintenance work. This was done on a daily basis.

Q. When you were performing your pipefitter duties during this period, Mr. Buckley, was it necessary to disturb the insulation in the pipes in the steam tunnels?

A. Yes, it was.

Q. What would you stand on when you were working on the pipes in the tunnels?

A. Could you repeat the question, please?

Q. Whereabouts would you stand when you were working on the pipes in the tunnels?

A. Well, if the line was right in front of me I would stand right next to it and try to do my repair. If it was over my head, a lot of times we would just stand

on another pipe to do the repair. The pipes were big so we used to just walk across them.

Q. What happened to the insulation on the pipes where you were standing on those occasions?

A. Well, like I said, I started there in '85 so already they was already in disrepair. Wherever there was a valve that had to be shut off or turned on periodically you

[698]

would see, there would be like foot -- where people had already walked on it, it would be worn away. You could see almost like a path that would be cut through.

Q. Would you tell us how you removed asbestos pipe insulation from the pipes in Grand Central from June of '85 up to '88?

A. We had various ways of removing it. Mostly, we would take a knife to cut the outer coating off. Then we take a pair of shears, it was like a wire lath holding it together. After we got that the off we would get a hammer, basically a hammer or crowbar, and start pulling it down and knocking it off. It all depended on what type it was.

Q. What happened to the insulation you were disturbing and moving during that process?

A. It would scatter all over the place. It would become airborne; just like taking baby powder and shaking it, that is the way it would look. You are just knocking it all off. It would be all over the place.

Q. Did you ever encounter the dust in the air during this process?

A. Yes.

Q. How much dust would you encounter?

A. There would be a lot of dust. Until it all settled down it would be all over the place.

Q. Did dust ever settle on your person?

[699]

A. Yes, it did.

Q. Whereabouts would it settle on your person?

A. Well, it would be all over you, all over your clothing, especially if you are working overhead. I am short so most of the work is over my head. We would be banging it off. It would come down on top of your hair, in your ears, you would find it in your mouth.

Q. What was this sensation of the dust in your mouth?

A. it was like if you ever went to the beach and got sand in your mouth, it would be the same way. You would feel like a gritty feeling, some of it.

Q. How about your nose, did it ever get in your nose?

A. Yes, it did.

Q. What was the sensation in your nose?

A. Your nose would get clogged up.

Q. During the time period from '85 up through June of '88 did you and your partners have physical contact with asbestos on a daily basis?

A. On a daily basis, yes.

Q. On average during this time period how many hours a day would you spend physically removing or handling asbestos insulation?

A. If you want to put on it an average basis it

[700]

would be an hour or two. Some days it was more. Some days we would work maybe 2 or 3 hours; some days 20 minutes. if you want to average it, I would say an hour a day.

Q. Are you familiar with the term "Snowmen of Grand Central"?

A. Yes, I am.

Q. What does that mean to you?

A. When I first started working there they were already calling the people in the pipe shop snowmen and I didn't understand what it was at first.

When I started working I understood why they were calling the people snowmen. When you came out of the tunnels you were covered head to toe with asbestos.

Q. Did you become one of the snowmen of Grand Central Terminal?

A. Once you started working in the pipe shop you automatically got that handle, yes.

Q. Can you recall your first job removing asbestos in Grand Central?

A. Yes, I can.

Q. Tell us about that.

A. It was a big deal for me because we were working in the Waldorf Astoria. At the time Metro-North would feed steam to the Waldorf steam. We had two 12-inch lines that went into their sub-basement. Eventually they got their

[701]

steam from Con Edison. We were required to remove our lines from their property.

There were two valves that came in side by side. They were located high up in the ceilings. We had to go there with ladders. We went on top of the ladder. This is the first time I ever had to do something this big. This is the first time I saw a valve that big.

We started knocking asbestos off. At the time I didn't know it was asbestos. We had to do that to get to the bolts. The valve is held together with the pipe with a flange, it is called. There are 16 bolts, one inch bolts that go around it to hold it together. You

have to knock off all the asbestos to get to where the bolts are.

Q. What happened when you knocked the insulation off?

A. It was over our heads so when I was knocking it down it would all become very powdery. It was like snowing down on top of us.

Q. Was that insulation in a dry or wet condition?

A. It was very dry.

Q. Can you give us examples of particular jobs where you worked with partners involving removing handling asbestos?

A. That was -- that one job there in the Waldorf Astoria stuck out in my mind more than any other job. It

[702]

was the Waldorf Astoria, a very famous place.

Also the 49th Street meter room, I changed a 16-inch expansion joint with another member of the pipe shop, and the expansion joint. The original joint was smaller and the expansion joint they bought was larger, so in order to fit it in we had to cut the line back.

In other words, we had to cut the flange off, cut a piece of pipe out to make the line longer, so in order to do that we had to remove the asbestos covering that was on the line.

Q. How far back from the immediate area did you remove the asbestos insulation?

A. We would go back about three feet on a job like that.

Q. Three feet on --

A. On one side and the other side maybe go back a foot to get the bolts out in order to drop this expansion joint.

Q. Any other jobs or locations that you can give us examples of?

A. Yes. The Biltmore Hotel when it was located in Manhattan, we also fed them steam, and when we discontinued feeding them steam they wanted -- Metro-North wanted the lines removed from the area. It is called the Biltmore area. They wanted the lines removed. It was two eight inch

[703]

lines, I believe it was, that fed them. They wanted not just the valves cut off. They wanted the lines out to make a big work area so we would have, we went down there and spent almost four days removing the asbestos. It was two eight inch lines. It was in a tight area.

We had to remove all the asbestos and as we were removing the asbestos. We cut the pipe with a torch, an acetylene torch. We would cut the pipe in three foot sections so we can hand over the pipe. The pipe is heavy. We had to move all the asbestos off the line, then cut the pipe into sections to get it out.

Q. Can you give us an example of a job in one of the east or west tunnels where you did asbestos?

A. The west tunnel, we were always working in the west tunnel repairing flanges on an 18-inch line where there was leaks at one time. We would have to remove the asbestos off the flange.

The same thing, you have to cut it back on either side to get to where the flange is so you can open it up and replace the gasket inside of it.

Q. How many feet on each side of that did you remove the asbestos?

A. About two feet; just so you have enough room to work.

Q. Mr. Buckley, when a pipe is leaking steam or

[704]

water, what is the first thing that you have to do in order to repair it?

A. We have to do a steam shut down it is called.

Q. What is the purpose of the steam shut down?

A. To relieve the pressure in the line so the line can be opened up. I think there is 175 pounds of steam pressure in the line.

Q. When the pipe is shut down what happens to the steam or water that is leaking?

A. If there was a leak on the line, once you shut it down it usually dries up because the pipe is very hot. It is like an iron. It is as hot as an iron, I guess.

Once you shut it down you let the line start to cool down. That would take an hour or two hours. The line would drop down and cool down before you were able to work on it.

Q. When you started to work on the particular area, how damp or dry would the insulation be where you were working?

A. It would be dry.

Q. The reason it would be dry is what?

A. The heat of the pipe would dry it up. Once the leak stopped, the heat from the pipes, it is like taking a wet pair of gloves and putting it on a radiator; eventually they dry.

[705]

Q. When you cut below the surface of the insulation, Mr. Buckley, what was the condition of the insulation below? Was it wet or dry?

A. It was dry.

Q. The air in the tunnels during the period from June of '85 through June of '88, was that in a dry or moist condition?

A. Predominantly, most of the areas we worked in were very dry.

Q. Why is that?

A. Steam, it is like having radiators, like having 1,000 radiators in this room. It would be very dry.

Q. When you were removing the asbestos pipe insulation, how far away from it would your face be?

A. Arms length.

Q. Did you and your partner pipefitters use any devices to circulate the air in the steam tunnels?

A. we used electric fans and we used to use a device called an air horn.

Q. How would you describe an air horn?

A. We used an air horn. It was a device used -originally we used it to divert steam. If had you a steam leak and you were trying to work on it with the pressure on, you would put this horn facing up and it would just suck the steam away from you. But eventually we used to use them to

[706]

keep cool with.

Q. Did laborers use air horns as part of their job?

A. No. It was just the pipe shop that used to use air horns.

Q. What would happen to the friable asbestos in the area you were working in when one of the air horns were turned on?

A. Everything would start blowing around.

Q. What type of fans would you use?

A. We would use box fans, they are called, large box fans. We used to wheel them down.

Q. What would happen when the fans were turned on in the tunnels?

A. If it wasn't too hot, if the tunnel was too hot, they would shut off automatically. There was a safety device on them. When they overheated they would shut down which happened a lot but if it was where they would stay on, they would just blow the air around. It wasn't that it was cooling you. It was just a breeze. We were trying to just get a breeze.

Q. Are you now familiar with a device known as a personal air monitoring device?

A. Yes, I am.

Q. Briefly, what does that do?

A. From what I understand, they hook it on to your

[707]

belt and then there is a hose that comes up and goes around your shoulder and it is supposed to monitor

the air that is around your breathing area. It is supposed to take samples of it.

Q. From June of '85 up through June of '88, did Metro-North provide you with any such personal air monitoring device?

A. No, they did not.

Q. From June of '85 up to June of '88 did Metro-North ever measure the amount of asbestos fibers in the air you were breathing while you were actually working with friable asbestos insulation in the tunnels?

A. No.

Q. Between '85 and June of '88 did you ever see any air measurement devices in the tunnels at all?

A. No. While we were working, no, sir.

Q. Have you reviewed the exhibit marked Plaintiff's Exhibit 0028, a list of the ambient air samples taken in Grand Central from 1985 through June of 1988?

A. Yes, I saw this.

Q. Will you tell us, during the entire year in 1985, how many ambient air samples were taken by Metro-North?

A. Seven.

Q. What were the locations of those samples?

A. There was two taken in the ticket office. The

[708]

rest were taken at a location known as the refrigeration plant.

Q. on what dates were they taken?

A. There was two taken on 4/22/85; the rest were taken on 1/3/85.

Q. You began working for Metro-North in what month of '85?

A. June of 1985.

Q. For the entire year 1986, how many ambient air samples did Metro-North take for 1986?

A. There is none here for 1986.

Q. None?

A. None at all.

Q. Between January of 1987 and August of 1987?

A. Can you repeat the date? I am sorry.

Q. Starting in January of 1987, do you see that?

A. Yes.

Q. Going up to August of 1987, how many ambient air samples did Metro-North. take in Grand Central Terminal?

A. Four.

Q. What were the dates for those samples?

A. 1/5/87, 1/5/87, 7/21/87, 7/21/87.

Q. Were any of those ambient air samples taken at a location or time when you were actually removing or handling asbestos insulation?

[709]

A. Not that I could say, no.

Q. I direct your attention to the background ambient air test taken on September 23, 1987 at the pipe shop; do you see that there?

A. Yes.

Q. In September of 1987 did you remove asbestos insulation in the pipe shop?

A. No, I did not.

Q. Do you recall seeing any air test device in the pipe shop while you were working your shift?

A. No.

Q. I direct your attention to the background ambient air test taken on March 22, 1988. Would you turn to that, please, in the east tunnel?

A. Okay, I have it.

Q. That was taken by Envirosafe?

A. By Envirosafe, yes, sir.

Q. Did you ever remove or handle asbestos in the east tunnel when an air testing device was present?

A. No.

Q. Prior to late 1987, Mr. Buckley, but before that, from '85 up through August of 1987, did Metro-North give you any asbestos protective clothing to wear while handling asbestos?

A. No, they did not.

[710]

Q. Did anyone at Metro-North make you aware that asbestos protective clothing was available?

A. No. Nobody ever offered us or nobody ever told us there was anything available to us.

Q. Prior to September of '87 did you ever see any asbestos protective clothing being worn in Grand Central Terminal?

A. No.

Q. What clothes would you wear while you were handling asbestos from '85 up through late 1987?

A. Street clothes, work clothes.

Q. Did Metro-North instruct you to wash your clothes before going home to work?

A. No.

Q. At the end of the day, what did you do about any dust on your work clothes?

A. We would go back to the shop. We have an air hose. We on would blow ourselves off the best we can.

Q. Did you ever leave Grand Central to go home in dusty work clothes?

A. Sometimes I did; if I was in a rush to get home, yes.

Q. Did Metro-North provide you with any laundry facilities?

A. No, they did not.

[711]

Q. Did there come a time on August 31, 1987 when Metro-North sent you to an asbestos awareness class?

A. Yes, they did; August of 1987.

Q. How long did that class last?

A. Actually, it only lasted six hours. People say it is eight but it was only six.

Q. Why was it six?

A. Because we reported to work at 8:00 in the morning. When we got to work they sent us over there. We didn't get there until 9:00. At the end of the day we had to report back so we left there around 3:00 in the afternoon do get back to Metro-North.

Q. Who conducted that class?

A. A company called Envirosafe.

Q. What is Envirosafe as far as you know?

A. It is an asbestos removal company.

Q. Was the term "friable asbestos" explained to you during that class?

A. During that class, yes, it was.

Q. Was that the first time you heard the term?

A. Yes, it was.

Q. What is your understanding of the term "friable asbestos?"

A. From my understanding, asbestos that is loose and hanging and that can become airborne.

[712]

Q. Knowing what you now know about friable asbestos, was there any such asbestos in the tunnels from June of 1985 to June of 1988?

A. Yes, there was.

Q. During that class were you informed of any health hazards to human beings that asbestos exposure can cause?

A. Yes, I was.

Q. What hazards were you informed of?

A. They showed us a training film and they explained to us about different diseases you can get from asbestos.

Q. What diseases did they explain?

A. Lung diseases mainly. There was one mesothelioma, that stuck out in our minds the most.

Q. Did that class illustrate any of those diseases for you by video or movies?

A. Yes.

Q. What type of illustrations were you shown?

A. There was two films. There was one film they showed us that was more or less like a cartoon. There was a cartoon character involved it in.

The second one, they were discussing how, when you do remove asbestos, the way to do it with full encapsulation if you are doing a big area, and then the film got on to telling you about different diseases you can get, and at the end of the film a guy was talking, he was lying

[713]

in bed and dying of mesothelioma.

Q. After that class, were you given a certificate of any kind?

A. They gave us a certificate; it was -- that we attended an asbestos awareness class, yes.

Q. Who gave you that certificate?

A. We received that, I believe it was the next day, from Mr. Macaluso.

Q. What position did he have?

A. I believe he was superintendent, some type of superintendent of maintenance.

Q. What did superintendent Macaluso tell you was the meaning of that certificate?

A. He told us that those certificates he handed us were licenses to remove asbestos and that we were licensed now to remove asbestos.

Q. What did that certificate actually say?

A. Now I learned -- actually, now the certificate, all it says is that we attended an asbestos awareness class.

Q. Mr. Buckley, I am handing you page 37 of Plaintiff's Exhibit 0099 and ask you to read the definition of "competent person" on that page to yourself, if you would? Just read it, please.

A. Okay.

Q. Mr. Buckley, as far as you know, were you trained

[714]

to be a competent person within the meaning of that definition?

A. Not what this says, no, I was not.

Q. Did you ever actually receive a license to remove or handle asbestos?

A. No, I did, not.

Q. After that class in August of 1987 did your Metro-North supervisors assign you to removing and disturbance of asbestos in the tunnels?

A. After they gave us the certificates they told us we were licensed to remove the asbestos. Now we had no complaints. To do it; just keep doing it.

Q. Between June of 1985 and that class in August of 1987, did Metro-North instruct you to wear any respirator while removing asbestos insulation?

A. Would you just repeat the first part of the question?

Q. Between June of 1985 when you started work at Metro-North and that class in August of 1987 --

A. Yes.

Q. Did Metro-North instruct you to wear a respirator while removing asbestos insulation?

A. No, they did not.

Q. In February of 1987, did you attend a respirator class?

[715]

A. What month? My mind is wandering.

Q. In February of 1987.

A. Yes, I did.

Q. During that class were you instructed to wear a respirator while working with pipe insulation?

A. We went -- the class we went to, they just showed us how to use masks, 3M masks.

Q. When you refer to a "3M mask," what are you referring to?

A. The type of mask, a half face, a green mask.

Q. During that class were you instructed to wear any such respirator while removing asbestos pipe insulation?

A. No.

Q. Were you given any respirator at that class or shortly after that class?

A. No, because when I took that class, they didn't give me a mask because I had a growth, a beard growth, and they wouldn't fit me with a mask so I had to sit in and listen to the class but I received no mask from that class, no, sir.

Q. Did Metro-North ever provide you with a half face respirator?

A. Ever?

Q. Yes; subsequent to the class?

A. No, they did not.

[716]

Q. At the one-day class in August of 1987 did Metro-North provide you with any respirator?

A. Yes, they did.

Q. What did they provide you with?

A. A half face respirator. They gave it to us at that class.

Q. How did they give that you respirator?

A. We sat down, they gave us a lecture. Then we saw the films. Then we went into a room in the back and they were going to teach us how to remove asbestos. As we went in there there was a woman in back and she would look at your face and hand you a respirator to wear.

Q. were you handed such a respirator?

A. Yes, I was.

Q. In the months following that class in August of 1987 did you continue to work with and around asbestos?

A. Yes, I did.

Q. During those times did you attempt to use that half face respirator?

A. Yes.

Q. What would happen when you tried to use the half face respirator when you were working on the asbestos insulation?

A. A lot of times you couldn't get a good fit on the mask because it was big, they gave you a large one, and you

[717]

had a gap underneath your chin. So it wouldn't fit the way it was supposed to.

Now I know the way they are supposed to be fitted now. They didn't fit that way. They would hang down. Being that you were working in tunnels that were very hot, you would sweat, so the mask would pull down on your face as you were trying to work.

Q. Did you ever try to adjust the mask while you were working?

A. Yes. You would constantly have to adjust the mask. You would have to pull it back on your head. You would get wet from sweating and it would fall down on your face.

Q. What did you do about the fact that the respirator wasn't working?

A. We complained to our immediate supervisor.

Q. Who because that?

A. Michael Maestrallis.

Q. What did you say to the supervisor?

A. We said, the mask didn't fit correctly. He said, do the best you can. If it don't fit, don't worry about it.

Q. Did you ask for a new respirator?

A. He said, this is what they gave you at the class, this is all we have right now.

Q. Did Metro-North give you any instructions

[718]

regarding wearing the respirators in the public areas of the terminal?

A. Yes. One time we were working on, I believe it was, track 23. I was with another member of the pipe shop, Glenn Edmonds, and we were repairing a steam line that used to give steam to the trains. It was a 2-inch line. We had on change the valve.

In order to change the valve we had to remove the asbestos. We were going to do a glove bag technique. When Mr. Macaluso came up, he saw us working there. We had the masks on. He said, do not wear those masks in public areas. We do not need anybody to know what is going on here.

Q. Did Metro--North eventually supply you with a full face respirator, Mr. Buckley?

A. Yes, they did.

Q. When did they give you a full face respirator?

A. I believe it was in 1988.

Q. Do you recall the month?

A. I know it was, I think it was May of 1988. We had training on it. Somebody came to our shop and trained us on the how to wear the mask but they didn't give us any. That was just the training. It was months before. I think it was three or four months later on when they finally did give us that mask.

Q. After you had that training class for the full

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face respirator, did you sign any certificate of training that had you been trained?

A. I believe I did, yes.

Q. In the February of 1987 class, did you sign any certificate confirming that you had been trained or fit tested in February of 1987?

A. No. I signed a paper that I attended the class. As soon as you go there they have to take attendance so they know where you were that day so your supervisor knows you were at that class.

Q. During the class in August of 1987 were you shown a technique known as a glove bag technique?

A. Yes, I was.

Q. What is that technique?

A. A glove bag technique is a technique they use. You put a bag around a piece of pipe. It has to be a small line, not a big line.

Q. How small or how big?

A. The biggest line we ever tried it on was a 2-inch line which is only about this big with the insulation covering. We would put it around, staple it, put duct tape on trying to seal it up.

Inside the bag you would have gloves. Before you tried this, you would drop a knife inside the bag. There was a pocket that would hold the knife or whatever else you

[720]

were going to use to remove the insulation.

You would put your hands inside the bag, pick the knife up and start cutting away the insulation. Once you would do that you would take the pipe, take your hands back out of the bag, take the duct tape and wrap it around the top of the bag and cut it.

Q. Did you ever attempt to use that technique in the steam tunnels subsequent to August of 1987?

A. Yes, we did.

Q. What happened when you tried to do that?

A. It worked good until we got the insulation off. Once we got the insulation off the steam pipes, they are very hot. It just melted the plastic and the bag just dropped on the ground.

Q. What happened when the bag melted and dropped?

A. Everything came out of it.

[721]

Q. Did you tell your supervisors about the problems you were having with the glove bag?

A. Yes, we did,.

Q. What was their response?

MR. LANDMAN: Objection; relevance.

THE COURT: I will allow it.

Q. What was their response?

A. Just continue doing that, that they knew about the problem.

Q. Do you consider yourself to be personally familiar with the conditions of the pipe insulation in the Grand Central tunnel from 1985 up to June of 1988?

A. Yes, I do.

Q. Have you been in the same tunnel in June and July of 1994?

A. Yes.

Q. How did the condition of the asbestos pipe insulation in those tunnels in 1994 compare to the condition of the asbestos insulation during 1985 to 1988?

A. It's a lot better now.

Q. How do the conditions differ?

A. Well, in most respects, it is no longer friable, and the area has been cleaned up. A lot of the pipes have been removed so you don't have as many pipes any more.

Q. Who performed that work as far as you know?

[722]

A. I know they had -- it wasn't just one company that did it -- they had a few different companies, because there was a lot to be done. So they had a few different companies coming down, removing the asbestos.

Then they had another company come in and remove all the pipes after the asbestos was removed.

Q. Did you personally observe those workers doing work in the tunnels?

A. I couldn't avoid but seeing many people down there.

Q. How would they go about removing the asbestos insulation?

A. They would do a technique called a full capsulation, where the whole area was laden with latex -- not latex -- plastic bags, giant bags, and wrapped them all around the floor. Then they would build a wooden enclosure around it and the people would go inside there, you know, all dressed in their suits. They would go to one area, they would get changed out of their street clothes into, you know, the protective clothing. Then they would go to another area to perform the work.

Q. Have you ever had any injuries while working for Metro-North?

A. Yes, I did.

Q. What type of injuries did you have?

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A. I have fallen. I fell on my back once. I cut myself. I was attacked once by an individual.

Q. Did Metro-North require you to report all injuries?

A. All injuries no matter how small they are, according to your safety book, are supposed to be reported immediately to the supervisor.

Q. And, Mr. Buckley, did you ever file any lawsuits over those injuries?

A. No, I was never in court with a lawsuit, no.

Q. During the calendar year of 1987, how many weeks did you not work due to vacation, sick day, permanent days, whatever?

A. I took my normal vacation time.

Q. How many weeks was that?

A. Two weeks I got.

THE COURT: Why don't you pick a time within the next five minutes or so for a break.

MR. GOETSCH: OK, your Honor.

THE COURT: It doesn't have to be now.

MR. GOETSCH: Great.

A. Then you have, you know, regular holidays, Christmas, New Year's we would get off. And then there was one period where I would take a few weeks off from work; I had personal business to take care of.

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Q. Did you receive a letter from your superintendent regarding that?

A. Yes, I did.

Q. Did you meet with him?

A. Yes, I told him I was having some problems and he understood.

Q. Were you ever disciplined and charged in connection with your attendance?

A. No, I was not. After I was talked to, I corrected the situation.

MR. GOETSCH: This is a good place, your Honor.

THE COURT: Why don't we just take a short break. (Recess)

THE COURT: Please proceed.

Q. Mr. Buckley, when you went to that respirator training session in February of '87, did you know that the insulation material which you were working with at that time contained asbestos?

A. No, nobody told us that.

Q. Did anyone at that training session inform you that the insulation you were working with did contain asbestos?

A. No.

Q. Did anyone at that training session instruct you to wear a respirator while removing the pipe insulation at

[725]

Grand Central?

A. No.

Q. Mr. Buckley, when did you know for a fact that you had been working with asbestos at Grand Central Terminal?

A. When we actually found out that it was asbestos was in August of 1987 when we attended the training course that Envirosafe gave us.

Q. Mr. Buckley, in the month following that training class in August of '87, how did you feel about your asbestos exposure?

A. Once I found out about it, I was mad that all the years that we were doing it, that we were just now finding out it was asbestos. I was scared, I was upset, and I was angry at Metro-North.

Q. What were you scared about, Mr. Buckley?

A. Just watching the films, they told you about the exposure, how a small exposure could kill you.

Q. Did you express your concern and fear to anyone?

A. Yes, I did.

Q. Who did you express your concerns with?

A. We started with our immediate supervisor Maestrallis. From there we went to the superintendents, Macaluso, Gropper, went to the safety department. Finally, I wrote a letter, along with other people in the pipe shop,

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to the terminal superintendent, Palmer. And he returned a letter to us stating that it's your job to remove asbestos, you're licensed now, so do it.

Q. When you spoke to the foremen, supervisors and superintendent, what did you express to them? What was the concern that you expressed?

A. I wanted to know what was going on. I was scared. You know, is this stuff really going to kill us like the film told us it was going to? We wanted some more answers. We weren't going to remove it any more. We told them we weren't going to remove it, that's it. There was a daily fight every day. Either you remove it or you'd be out of a job.

Q. After that letter from the general superintendent of Grand Central Terminal, did you express your concern to anyone else in?

A. The MTA Inspector General's Office is located in Park Avenue.

Q. What is the MTA Inspector General's Office?

A. They investigate crime and corruption throughout the MTA system.

Q. What is the address of that office?

A. It is 100 Park Avenue. It is right across the street from Grand Central Terminal.

Q. When did you go to the Inspector General's Office?

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A. It was the early part of 1988.

Q. What did you go to the Inspector General's Office, what prompted you to go?

A. I went there. I wanted to find out if they could do anything to hold Metro-North liable for what they did to me.

Q. What concerns did you express to the Inspector General at that point?

A. I told him about the training, you know, the training films we saw. I expressed my concern about the asbestos level, the asbestos contamination level that I received in previous years, and I wanted to know what was going on. I wanted it to be stopped. I didn't want to do it any more.

Q. What happened with that Inspector General investigation?

MR. LANDMAN: Objection; relevance.

THE COURT: Sustained.

Q. Did there come a time, Mr. Buckley, when you learned that the Inspector General had issued a report regarding your complaint?

A. The report come out, I think it was, 18 months after we originally went there, and they had sent the report down to us.

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Q. What effect did the issuance of that report have on your concern about your asbestos exposure at Grand Central?

A. It confirmed my fears, because in the context of the report, it was also investigated jointly with the Robert Abrams office, the Attorney General's Office. And they did cite numerous violations Metro-North was committing

MR. LANDMAN: Objection.

Q. Without stating any particular citations or violations, Mr. Buckley, my question was: What effect did the issuance of that report have on your state of mind regarding your asbestos exposure?

A. It confirmed my fears even more and made me angrier.

THE COURT: Cite the particular thing that the report said which caused your mind to react.

MR. GOETSCH: I am sorry, your Honor?

THE COURT: I am saying I am overruling his objection. He can cite what there was in the report that caused his mind to react.

MR. GOETSCH: Thank you, your Honor.

Q. Mr. Buckley, will you tell us what was in the report that caused your mind to react in the way that you testified?

A. I can't cite page for page what it said, but in context,

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if I can take it out of this, it said Metro-North was breaking the law by making us remove the asbestos.

Q. How did that make you feel about your asbestos exposure?

A. As I said, it made me even angrier, it made me even more frightened because their own agency is investigating and said, yes, you are doing wrong, you can't do this.

Q. Were you here, Mr. Buckley, when Department of Labor Inspector Joseph Stremlin testified?

A. Yes, I was.

Q. Were you working in Grand Central Terminal when Department of Labor Inspector Joseph Stremlin inspected Grand Central in October of '89?

A. Yes.

Q. What effect did Mr. Stremlin's inspection have on your state of mind regarding your asbestos exposure?

A. Again, after Mr. Stremlin did an inspection, he did write a report on the conditions he had found in the Grand Central Terminal, and when the report came out.

MR. LANDMAN: Objection, your Honor. The relevant time period is June 1985 to June 1988 for which plaintiff is claiming exposure. Mr. Stremlin testified on the first day of the trial that he was not even there until 1989. So I don't see the relevance of this.

MR. GOETSCH: We are talking about his concern and anger and feeling about his asbestos exposure during that period.

THE COURT: He can tell us about what generated his anger.

MR. LANDMAN: Even if it is not based on the exposure period?

THE COURT: Anything that caused him anger he can tell us about.

THE WITNESS: Thank you, your Honor.

A. After Mr. Stremlin did his inspection and investigation of Metro-North practices, he wrote a report. That report came out, and it did cite Metro-North in numerous violations that they committed and were still committing at the time of his inspection -- the

working conditions, the conditions of the pipes, how he had told them in the past to correct the situations, and in the report he cites that after he came back the situations were still the same.

Q. How did that make you feel about your asbestos exposure?

A. I didn't know who to trust anymore. Metro-North, you know, I am working for a company who is supposed to protect you, their safety department is supposed to make sure you work in a safe area. And they are not.

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They weren't making sure that where I had to work was safe; that I wasn't going to die from asbestos or something else. They weren't making sure of that. All they wanted to do was make sure you worked. That's all they cared about.

Q. After Mr. Stremlin's inspection, were you given a personal air monitoring test in October '89?

A. Yes, after he was in, he insisted that people have air monitoring tests done.

Q. What was the effect of you having that personal air monitoring test in October of '89?

A. Even I found --

MR. LANDMAN: Objection. This is a personal air monitoring test that is now done a year after the relevant time period. I don't

see how this could possibly be relevant.

THE COURT: If he can explain why that made him angry, you can cross-examine.

MR. LANDMAN: Your Honor, can we just approach for one thing, because there is one document I would like to share with the Court.

THE COURT: All right.

(In the robing room)

MR. LANDMAN: Your Honor, what plaintiff's counsel is now getting into is that there was one air monitoring test that was done in 1989, October '89, which

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was arguably a little bit over the permissible exposure limit. The point about this is, and why I wanted to talk to your Honor outside the presence of the jury: On September 26, 1994, we received a letter from Mr. Goetsch which specifically confirmed various discussions that had gone on, on which we henceforth had prepared this case, Metro-North and the plaintiff. It states: That the plaintiff is claiming exposure to hazardous amounts of asbestos for an average of one hour per day while actual removal, handling

and working in asbestos insulation, as opposed to ambient air exposure -- which is what they are getting into during the period from June of 1985 to June of 1988.

Having seen generally his, I would say, case collapse, he is now trying to introduce a new aspect to this case, which obviously we did not cross-examine Dr. Nicholson about, Dr. Markowitz about, and it is just going to put something in front of the jury that they specifically said is not in there. They are going to talk about a test that occurred 15 months after the time period that is relevant.

Even if his exposure level showed on that particular day it was over the permissible exposure limit, they completely said that is not part of their claim in this case. It is going to cause me, your Honor, among other people, to call a number of other witnesses to talk about that particular exposure, and it is going to introduce the whole

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ambient air exposure history, which we are prepared to do, but it is going to change this case dramatically from what the agreement was of counsel. Plus, the jury is going to hear this in the absence of any testimony by any

expert that it makes one bit of difference. No cross-examination. They didn't bring it in. They didn't list it as a trial exhibit.

THE COURT: Why doesn't that letter exclude it?

MR. GOETSCH: I am not going to ask him the results of that test.

THE COURT: No, but you said they are not going to talk about that kind of exposure. That is the end of that.

MR. GOETSCH: But, your Honor, the relevance is this, if you will.

THE COURT: You said you are not going to talk about it. You should have thought about that before you signed that letter.

MR. GOETSCH: It does relate to the '85 and '88 because he wasn't given personal tests then and that is part of his concern. That is the only relevance and that is all it is offered for, not the results.

THE COURT: You are not going to talk about this type of exposure. You said you weren't and you are not going to. That is the end of that.

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MR. GOETSCH: Your Honor, can I ask him what the effect of just having the test was on his concern? That is all. Not the result. Just what effect did that have on your concern and worry about your asbestos exposure from '85 to '88. It concerned him because --

THE COURT: You said you weren't going to go into this thing.

MR. GOETSCH: For exposure. It is relevant.

THE COURT: You have an exception.

(In open court)

Q. Mr. Buckley, after you were given that personal air monitoring test, did Metro-North send you for any asbestos medical testing?

A. Yes, I believe they did.

Q. From August of 1987 up to that point in October of 1989, had you ever asked Metro-North to test you for asbestos exposure?

A. Yes, we did. I am sorry, I did.

Q. What response did you get?

A. Well, "No."

Q. Where did Mr. North send you for this asbestos medical test in October of '89?

A. The medical department at Grand Central Terminal.

Q. Are you referring to the Metro-North medical department?

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A. Yes, Metro-North medical department.

Q. And what test did the Metro-North medical department perform on you regarding asbestos?

A. That is breathing through a tube to measure your lung capacity. They took a blood test and a urine test. And they sent us for a chest x-ray.

Q. Who conducted those tests?

A. A nurse that was working there at the time.

THE COURT: I didn't understand what you said.

THE WITNESS: A nurse that was working there at the time.

Q. Mr. Buckley, did you ask the Metro-North medical department for copies of your x-rays and test results?

A. Yes.

Q. Did they provide you with copies of your x-rays and test results?

A. No, they did not.

Q. How did that make you feel in relation to your asbestos exposure?

A. At first I was mad. I said maybe they are hiding something from me. And then I asked them. They said, if there was anything wrong with you, we'd let you know.

Q. Did you ever ask the Metro-North medical department to be examined by a medical doctor for asbestos exposure?

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A. Yes, I did.

Q. What was their response to that?

A. They told us the procedure is the same, that the nurse that does it is the one that is going to continue to do it.

Q. Did Metro-North offer to pay for the cost of a medical doctor to examine you?

A. No.

Q. Did your regular medical coverage cover the cost of an outside medical doctor to do an asbestos exam?

A. No, because I was worried about asbestos contamination or exposure, I am sorry, exposure, and that is considered an on-the-job injury. And my personal medical would not cover that. It would have to be

covered by the Metro-North, would have to pay for that.

Q. When did you decide to retain a law firm regarding your exposure to asbestos in Grand Central Terminal, Mr. Buckley?

A. Well, after I read all of these reports there, the Inspector General's report --

THE COURT: No, "when," he said.

THE WITNESS: I am getting to that, your Honor, I am sorry. It was in 1989 I decided that I was going to try to get somebody to represent me legally.

Q. Was that before or after your asbestos medical

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exam at Grand Central Terminal?

A. It was after.

Q. Tell us, why did you retain a law firm at that point in time?

A. I wanted Metro-North to be held accountable for what they did.

Q. How did it come about that you retained my law firm?

A. I went to another law firm originally, and I had gone home and I was talking to my father about it, and my

father suggested another law firm, which was Cahill, Goetsch & DiPersia. And, of course, my father told me he is personally, he knows one of the attorney's sons that he worked with on the railroad.

Q. Which attorney was he referring to?

A. Mr. Cahill.

Q. How did he know my partner Mr. Cahill?

A. Mr. Cahill's father had stayed in my house a few times. My father and Mr. Cahill's father worked together. My father was an engineer and Mr. Cahill's father was a conductor on the railroad.

Q. How did you first contact my firm?

A. My father gave me the phone number and I called.

Q. And who did you speak to when you called?

A. Your associate.

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Q. Who is?

A. Mr. Cahill.

Q. Mr. Cahill?

A. Yes, sir.

Q. What did you ask Mr. Cahill when you called him?

A. If Metro-North can be held accountable for what they did.

Q. What did Mr. Cahill say to you?

A. He'd do his best.

Q. Did you personally meet with my partner, Mr. Cahill?

A. Yes, I did.

Q. Whereabouts was that?

A. Across from Grand Central Terminal. It was a Howard Johnson there at one time, and I met him in there.

Q. Was it at that point that you retained my firm?

A. Yes, it was.

Q. In the months leading up to retaining an attorney, Mr. Buckley, did you have any concerns about increased risk of developing asbestos disease?

A. Yes, I did.

Q. Did you know how much of an increased risk you had at that point?

A. From the training films that Metro-North themselves were sending me to, told me it was a high risk.

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Q. But did you have any particular amount in your mind at that point in time?

A. A lot. A lot.

Q. What was your position regarding being examined by an asbestos medical doctor outside of Metro-North?

A. I wanted to find out exactly what my chances are of contracting asbestosis or mesothelioma, so I wanted to find a doctor that was just not a nurse at Grand Central. I wanted to find a doctor that knew more about it, a specialist.

Q. Did you know of any such asbestos specialist?

A. No, I did not.

Q. What did you do about going to a medical doctor outside of Metro-North?

A. I discussed it with Mr. Cahill.

Q. What was the nature of that discussion?

A. I wanted to know if he could recommend somebody, a specialist that I could go see to find out exactly what my chances are of contracting asbestos-related diseases.

Q. What was the upshot of that?

A. He recommended me to a doctor in Mount Sinai Hospital.

Q. When did you first go to Mount Sinai Occupational Health Clinic?

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A. I believe it was in 1991.

Q. What doctor were you examined by?

A. Dr. Herbert.

Q. What month of the year was that?

A. It was the early part, maybe February or March, I am not sure. I can't tell you the exact month. I know it was the early part; it was cold out when I went there.

Q. What year was that?

A. I believe it was 1990, '91.

Q. Were you examined by Dr. Herbert?

A. Yes, I was.

Q. Did she take your medical history?

A. Yes, she did.

Q. Did she ask about your occupational history?

A. Yes, she did.

Q. And did she conduct a physical exam?

A. Yes.

Q. Were you given any tests?

A. Yes, I was.

Q. What type of tests were you given, do you recall?

A. Yes, I had another test where you breathe into a tube, it measures the capacity of your lungs. Various blood tests, urine tests, stool tests, chest x-rays.

Q. How long were you at the Mount Sinai Clinic?

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A. It must have been almost seven hours altogether.

Q. Did Dr. Herbert discuss her findings with you?

A. Yes, she did.

Q. What was your understanding as to the effect of the asbestos exposure on you at that point?

A. With the history I gave her of my past medical history and the amount of asbestos I explained to her that I was working around on a daily basis, she said that I had a --

MR. LANDMAN: Objection; hearsay, your Honor.

Q. The question was, what was your understanding, Mr. Buckley?

A. That is what I am saying.

THE COURT: I will allow it.

MR. LANDMAN: He is telling us what she told him.

THE COURT: Yes, but how else can we find out what his reaction was?

MR. LANDMAN: Your Honor, if I can make one suggestion: it is coming in solely for his reaction and not for the truth of what she said.

THE COURT: Yes. We can't cross-examine her. But he heard it and he reacted.

A. That I had an increased risk of coming down with asbestos-related disease.

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Q. Did that come as surprise to you at that point?

A. At that point, no.

Q. What effect did that have on you, learning that from her?

A. Learning from somebody that actually is an expert in the field scared me; it made me worry a little bit more than I was already worried.

Q. Did Metro-North pay for the test and exams at Mount Sinai?

A. No, they did not.

Q. Did you return to Mount Sinai Occupational Clinic?

A. Yes, I did.

Q. And do you recall the month and the year?

A. It was in 1994. I think it was February 1994.

Q. Did a medical doctor examine you on that occasion?

A. Yes.

Q. What was his name?

A. Dr. Markowitz.

Q. Did you give him your medical history?

A. Yes, I did.

A. Yes, I did.

Q. Occupational history?

A. Yes, I did.

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Q. Did you undergo any tests?

A. Yes.

Q. What tests?

A. Same series of tests I just explained with the previous doctor.

BY MR. GOETSCH:

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Q. On that occasion, were you interviewed by another doctor at Mount Sinai?

A. Yes.

Q. What was his name?

A. Dr. Nicholson.

Q. Did you tell him about your exposure to asbestos at Grand Central?

A. Yes, I did.

Q. Did Dr. Markowitz discuss his findings with you?

A. Yes.

Q. Did you discuss whether you have any particular increased risk of developing asbestos-related disease?

A. Yes.

Q. What is your current understanding, Mr. Buckley, as to whether you have a significant increased risk of developing asbestos-related disease?

A. Yes. I am in a high risk.

Q. What diseases are you at risk for; as far as you know?

A. I explained, mesothelioma, asbestosis and there is various other lung-related diseases. There is a type of, I think it is a stomach one or colon that can develop from it.

Q. What is your understanding as to the amount of

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this significant increased risk that you are now at, Mr. Buckley?

A. Could you rephrase the question? I didn't understand it.

Q. Do you have any current understanding as to any quantitative amount of increased risk that you are currently at?

A. I don't know the figures exactly, but I think it -- he said I have a 5 percent increased risk, 5 to 8 percent increased risk.

Q. Mr. Buckley, when you were first hired by Metro-North in 1985 were you given a physical exam?

A. Yes, I was.

Q. At that time did you indicate how much you smoked?

A. Yes, I believe I did.

Q. What was your indication at that time?

A. Maybe a half pack a day, a pack a day.

Q. In the years following that exam in 1985, what was the rate of your smoking? Did it increase or decrease?

A. It usually decreases. I go through periods. I will smoke and then maybe years go by where I won't smoke again. Sometimes I quit for maybe a year and I will go back again. I usually average a cigarette or two a day.

Q. In October of 1989 when Metro-North sent you for

[746]

the asbestos test at Grand Central Terminal, did you fill out a questionnaire on that occasion?

A. Yes, I did.

Q. Was there any question about smoking on that questionnaire?

A. I believe there was.

Q. What was the question that you responded to in that questionnaire?

A. They ask you about your -- about smoking habits?

Q. Yes.

A. There was one there that asked you, if you smoked, and they said, if you smoke less than one cigarette a day, the rest of the answer did not pertain to you.

Q. What did you indicate at that time on the questionnaire?

A. That I wasn't a smoker because they said if it was less than one a day or for a certain period of time that they didn't consider you being a smoker, you didn't have to answer the questions or it didn't pertain to you.

Q. Was that the case at that point in time?

A. Yes.

Q. When you went to Mount Sinai and saw Dr. Herbert, were you asked about your smoking history then?

A. Yes.

Q. What were you asked about your smoking history?

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A. Dr. Herbert asked me how long I was smoking for. At the time I was smoking since I was 17 years old.

Q. What did you indicate was your lifetime smoking history?

A. I told her it varied from a half a pack a day to a pack a week.

Q. Did you fill out another medical questionnaire at the Metro-North medical department in late 1990?

A. It is possible, yes.

Q. Do you recall whether there was any question about smoking on that questionnaire?

A. They all had it.

Q. What did you indicate on that questionnaire?

A. What year was this?

Q. Late 1990.

A. That I was smoking less than a cigarette a day, I believe.

Q. Thereafter, after 1990, did you stop smoking completely for a period of time?

A. Yes, for a while, yes.

Q. When did you, after 1990, stop smoking completely?

A. After 1990?

Q. Yes.

A. When did I stop?

[748]

Q. Yes.

A. I think it was 1991 that I stopped.

Q. When you saw Dr. Markowitz in February 1994, what did you indicate to him about your smoking?

A. That I had stopped but I would smoke occasionally; I would sneak a cigarette now and again.

Q. Since February of 1994 when you saw Markowitz, up to the present time, did anything occur regarding your smoking habits?

A. Yes. I had just about it kicked altogether, the habit, and when my wife was in the hospital giving birth to my son, she was in extensive labor. We went there on a Friday night, about midnight, and we were there all night until the next day and about 1:00 in the afternoon they decided to do an emergency C section on her. They asked me to leave the room while they gave her an epidural.

They told me to go outside and get air. I sat there talking to the one of the nurses I met in the hospital and she had a cigarette and I asked her if I could have one.

Q. Did you smoke a cigarette on that day?

A. Yes, I did.

Q. Since that day up to the present time what has been your smoking rate?

A. I smoke an average of a cigarette a day, some days I will have more. Some days I will go without

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cigarettes. Sometimes I will have three or four cigarettes.

Q. On average, how much do you smoke?

A. On average, maybe a cigarette or less a day.

Q. Why do you smoke at the present time?

A. I feel if I have a cigarette or two, it relieves the nicotine crave I have.

Q. Do you have any plans about smoking in the future?

A. I would like to stop, yes.

Q. Do you feel that Metro-North is responsible for your cigarette smoking?

A. No. Whatever I am doing with cigarettes is my own responsibility. I accept that responsibility.

Q. Mr. Buckley, what is it like living with the knowledge that you have any increased risk of dying from cancer due to your asbestos exposure at Grand Central?

A. It scares me.

Q. What happens nowadays when you get a pain in the chest, for example?

A. Worry about it. You worry a little more. It scares you a little more.

Q. How do you feel about your asbestos exposure when you read about asbestos in the newspapers?

A. It bothers me. There is a lot of it in the paper today about asbestos exposure. It is all over the place. You just get tired of looking at it. It is on TV. It gets you upset.

You hear people talking about it that don't know anything about it. People at work talk about it all the time. You just don't want to hear it. You are just tired of it.

Q. What happens when a news story comes on TV about asbestos and you are watching it at home?

A. I will watch it for a while and then turn it off. It upsets me. I don't want to think about it and it upsets me, more so now that I have a family. I am just a little worried now. Am I going to be alive to see my son go to school? That bothers me more. Before it scared me but now that I am a father, it scares me even more. I want to be with my family more.

Q. As an emergency medical technician, Mr. Buckley, have you ever dealt with cancer patients?

A. Yes, on a daily basis. I work for an ambulance company besides working for Metro-North and we do a lot of work for nursing homes and we take care of a lot of elderly people.

Q. Is that a part time job that you have?

A. Yes. It is only part time.

Q. How does it make you feel to deal with cancer patients?

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A. Sad. I feel very bad for the people.

Q. How does that make you feel?

A. I look at myself.

Q. Do you have any understanding as to whether there is anything you can do medically to remove the asbestos fibers from your lungs?

A. No. There is no medical treatment for asbestosis.

Q. Are you willing to undergo periodic medical monitoring in the future with regard to asbestos disease?

A. Yes. Actually we are supposed to go every year. There is an OSHA physical that is supposed to be given every year by law, and I haven't been for one in over four years. Metro-North has not sent me even though they are obligated by law to send me.

MR. LANDMAN: Move to strike. It is not responsive, your Honor.

THE COURT: I don't think it was responsive. Strike it.

MR. GOETSCH: That is fine.

Q. Mr. Buckley, have you ever gone to a psychiatrist regarding your asbestos exposure?

A. No, sir.

Q. Why not?

A. What is a psychiatrist going to do for me? What

[752]

is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?

Q. Have you asked for any prescription drugs as a result of your asbestos exposure?

A. No.

Q. Why not?

A. What are drugs going to do for me? They are not going to take the asbestos away.

Q. Do you consider that your worry about asbestos is abnormal or normal?

A. If it is normal for me to worry?

Q. Yes.

A. of course, it is normal.

Q. Do you now believe, Mr. Buckley, that your exposure to asbestos at Grand Central could have been avoided?

A. Yes, very easily.

Q. How so?

MR. LANDMAN: Objection; it is irrelevant.

THE COURT: Yes, sustained.

Q. During the late 1980s, Mr. Buckley, did you ever wear asbestos-coated clothing home to your family?

A. If I was in a hurry to get home and I just wanted to get out of work, yes. If we were working a later shift, we would just wear what we had on; we would just go home

[753]

with it.

Q. How does that make you feel?

MR. LANDMAN: Objection; relevance, your Honor.

THE COURT: That is allowed.

MR. LANDMAN: There is no loss of consortium here.

THE COURT: It is his feeling we are concerned with.

Q. How does that make you feel?

A. I not only take it to my family but when you ride on the subway you contaminate everybody on the subway. Maybe there is somebody out there that I contaminated.

Q. How does that make you feel knowing that?

A. It makes you feel pretty bad.

Q. How do you feel, Mr. Buckley, about the fact that Metro-North did not warn you that you were removing asbestos for a period of years?

MR. LANDMAN: Objection.

THE WITNESS: I think it is criminal.

MR. LANDMAN: I think your Honor ruled on this.

THE COURT: I think he already testified to that.

Q. What was your hourly rate of pay back in 1985 to 1988?

A. When I first started with Metro-North you work on a pay scale. You get an increase every five years. I was

[754]

working at a 70 percent rate. It was maybe $10 an hour at that rate.

Q. Mr. Buckley, who do you feel is responsible for exposing you to asbestos from '85 to June 1988?

MR. LANDMAN: Objection, relevance.

THE WITNESS: Are you asking for one particular person or a group?

Q. I am asking you how you feel about who is responsible.

A. Who do I feel?

Q. Yes.

A. one person in particular would be Fred Palmer, he is the terminal superintendent, because he did have the last say on everything that did happen in the terminal.

If the people went to him and they told him about this, they brought it to his attention and he neglected anything, and the people under him were afraid of him. He told them what to do and they did it.

MR. LANDMAN: Move to strike. That is not responsive. It is not how he feels.

THE COURT: I will allow it.

Q. My question is, how do you feel?

A. He should be locked up because what he did to me was criminal; not only to me, but to everybody.

Q. Mr. Buckley, do you have any fears about your future now as a result of your asbestos exposure at Grand Central?

A. Yes, I do.

Q. How do you feel about your future?

A. I try not to think about my future but I am worried about it.

Q. What is it about the future that worries you?

A. Mostly not seeing my son grow up.

Q. Has your asbestos exposure had any effect on your relationship with your wife, Deidre?

A. A bit. We fight a little more especially now with this case going on.

Q. How does that make you feel?

A. It makes me mad at myself. I shouldn't lose my temper as much as I do.

Q. Has your asbestos exposure had an effect on how you relate to your son at the present time, Mr. Buckley?

A. I try to protect him a little more, watch everything he does and when he is around.

Q. Why is that?

A. I try to make sure nothing is going to happen to him.

Q. What effect has your asbestos exposure at Grand Central had on your peace of mind, Mr. Buckley?

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A. There is not really much peace of mind, especially when you have to think about what is going to happen. I should say, what could happen to me.

Q. Are there times when you feel any anger or bitterness about what has happened to you?

A. Yes.

Q. What times are those?

A. When I am at work mostly, when I think about what was done and what could have prevented -- what could have prevented this.

Q. How has your asbestos exposure affected your enjoyment of work at Metro-North?

A. There is no -- not much enjoyment anymore. I used to enjoy going to work. I used to enjoy working. Now I can't wait to get out of there at the end of the day.

Q. What is your feeling as to the worst thing about your exposure to asbestos at Grand Central, Mr. Buckley?

A. That it could have been so easily prevented with a little bit of training in the beginning and a little personal protective equipment.

Q. Why did you bring this lawsuit, Mr. Buckley?

A. I wanted to make sure Metro-North be held accountable for what their people did to me.

MR. GOETSCH: Your Honor, at this time I would like to read the jury one of the admitted facts on Exhibit

[757]

001.

"According to the United States National Center, for Health Statistics, vital statistics of the United States, annual, the life expectancy of a white

male person 39 years of age is 36.5 years."

MR. GOETSCH: No further questions at this time, your Honor.

THE COURT: Do you want to start now or

MR. LANDMAN: I am looking for a signal from the jury. Frankly, since the jury and everyone was so -- since it was a holiday, maybe we should just break a little earlier.

THE COURT: It seems to me it makes sense.

MR. LANDMAN: I would like to ask one question, though.

THE COURT: Okay.

CROSS-EXAMINATION BY MR. LANDMAN:

Q. Mr. Buckley, this letter that you say Mr. Palmer wrote, and I think your words were, "I don't care what you say, you just got to go in there and do it," I assume that really bothered you a lot, right?

A. Did it bother me?

Q. Yes.

A. It made me mad; yes, sir.

[758]

Q. I assume you kept a copy, right?

A. No, sir.

Q. You didn't?

A. I can produce a copy.

Q. Why don't you do that for us tomorrow?

A. You got it.

MR. LANDMAN: Thank you.

THE COURT: Okay. Tomorrow being Tuesday, 10:00. (The jury leaves the courtroom)

THE COURT: Does anyone have anything?

MR. LANDMAN: In terms of scheduling, your Honor, with the court's permission, because we have experts coming in from all over and because, I think, that there is going to be a fair amount of argument on the motion, would it be all right if, after the plaintiff rests tomorrow, if we didn't call any witnesses tomorrow afternoon; we could spend the time arguing the motion?

If the court thinks that is too much time we could work on jury charges and start our case on Wednesday?

THE COURT: I guess that makes sense.

MR. LANDMAN: I think there is going to be a fair amount of argument and I will have a memo of law for you tomorrow. I would like for you to have time to read it and think about it before we go forward because, boy, this is -I won't get into the argument now, especially in light of

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the fact that in this case both sides had stipulated after the 1990 ruling that this case should be 1292(b) certified, and the court, I think, rightfully, said, we ought to develop the record more.

I think this record is fully developed now. I am not sure there is a particular need to go much beyond what we have here. It is a ruling that is going to affect this case and another 140 cases. I think we will need a court ruling no matter what this jury does but I will certainly address that in more detail.

THE COURT: When did you think you will finish tomorrow?

MR. GOETSCH: After his cross, I have some exhibits that we are going to try to narrow our differences regarding and we may need some rulings on it, Judge, regarding

exhibits that we can't agree on, but, beyond that, your Honor, that is basically it.

MR. LANDMAN: I thought you were going to show a movie.

MR. GOETSCH: If Mr. Wasserman can get a video monitor, they produced a copy of a short video, one of the videos that was shown to him. I would like to show it. It is 15 minutes.

THE COURT: It looks as though you will finish by lunchtime.

[760]

MR. LANDMAN: He will be a while on cross. My guess is we will try and then the jury could have the afternoon off and we could argue the motion. All I wanted to make sure is that I don't have to have witnesses here tomorrow.

THE COURT: No. I think that is all right.

• • •

[766]

CROSS-EXAMINATION CONTINUED BY MR. LANDMAN:

Q. Good morning, Mr. Buckley.

A. Good morning, sir.

Q. Now, yesterday you were testifying about a letter that you claim Mr. Palmer wrote to you, is that right?

A. Well, to me, to us as people who were working in the area when we objected to the situation we were working in.

Q. And you brought in that letter, is that right?

A. Yes, sir, I did.

Q. I show you that letter which has been marked for identification, I guess, as Plaintiff's Exhibit 2. First of all, that letter is not written to you, is it?

A. No, it is written to my --

Q. No, the question is, is it written to you?

A. It's written to my sheet metal worker international --

THE COURT: Answer yes or no.

A. Yes, sir.

THE COURT: You have heard all about our tribal custom. Is it written to you? Answer: No -- if that is true. I haven't seen it.

THE WITNESS: No, sir.

Q. And you stated yesterday, Mr. Buckley, that the letter states, from Mr. Palmer, that you are licensed to

remove asbestos. Does that letter state that? Yes or no.

A. No, sir, it does not.

Q. And this is the letter you are referring to when you testified yesterday: the letter to us stating it's your job to remove asbestos, you are licensed now, so do it. Does that letter say anything about licensing?

A. No, it does not, sir.

Q. Do you have another letter other than this letter that suggests that?

A. No, sir.

Q. Thank you. Now, let's talk about smoking.

A. All right.

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Q. You knew when you started to smoke that you could develop cancer from smoking, didn't you?

A. Not at age 17, no, sir, I didn't.

Q. When did you find it out?

A. Later on.

Q. When?

A. Oh, I can't remember exactly when, sir.

Q. How old were you?

A. Maybe in my 20s.

Q. In the 1960s they started putting warnings on cigarettes, isn't that right?

A. Possibly, yes. I am not sure.

Q. You were 17 in 1971, isn't that right?

A. Yes.

Q. So when you were buying cigarettes you would agree with me that they had warnings on it that said: If you smoke these cigarettes, you may get lung cancer. Didn't they?

A. They could have, yes.

Q. Do you remember reading that?

A. No, sir.

Q. Do you remember seeing billboards with advertisements about cigarettes that said back in the '70s: If you smoke these, you may get cancer?

A. No, I do not.

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Q. You don't remember that?

A. No, later on in the '80s, probably, but not in the early '70s, no, sir.

Q. But eventually you learned that you can get cancer from smoking?

A. Yes.

Q. And you just kept smoking, didn't you?

A. Yes, I did.

Q. And you smoked for many years?

A. Yes, I did.

Q. And sometimes you smoked a pack a day and sometimes less, is that right?

A. Yes, sir.

Q. And sometimes in fact you smoked more than a pack a day?

A. Possibly, yes.

Q. You continued to smoke even though you read these warning labels on the cigarettes, didn't you?

A. Yes, sir.

Q. At your deposition, which was taken, just for time period, on April 12, 1994, you testified under oath you did not smoke. Isn't that right?

A. Correct, sir.

Q. And you claimed in your deposition you had stopped smoking in 1991?

[770]

A. Correct, sir.

Q. And there was no testimony in there at all about "I smoke one cigarette a day, I smoke 3 cigarettes a day," or anything like that?

THE COURT: You can't ask him that question if you didn't ask him a question that should have produced that answer.

Q. You claimed in your deposition that you stopped smoking because of the risk of cancer, isn't that right?

A. Yes, sir.

Q. When was your son born?

A. May 21.

Q. Of this year -- 1994?

A. 1994.

Q. And you claim -- I just want to make sure I understand your testimony -- that from 1991 until May 21, 1994, you didn't have any cigarettes?

A. If you heard me yesterday, I said that I was sneaking cigarettes now and then.

Q. Well --

A. I did state that yesterday, sir.

Q. But at your deposition you stated that you stopped smoking in 1991?

A. Well, because when I was talking to Dr. Markowitz, he said if you smoke a cigarette occasionally,

[771]

it's considered not smoking. And he did state that on the stand himself.

Q. But when you gave your answer in your deposition, you didn't explain that, did you?

A. I wasn't asked that.

Q. On page 43, line 10 -- now, Mr. Buckley, you remember being under oath in this deposition; right?

A. Yes, I do, sir.

Q. On page 43, line 10:

"Q. As a matter of fact, you continue to smoke up to the present time?

"A. No, I do not smoke, sir.

"Q. When did you stop?

"A. My wife and myself both quit at the same time in 1991 when my wife decided she wanted to get pregnant.

"Q. Are you saying you haven't smoked since 1991?

"A. Yes, sir."

Those were your answers then, right?

A. Yes, it was, sir.

Q. And you are telling us now that those answers were not true?

A. The statement I made, the way I felt, was not true because I was told that if I smoke an occasional

[772]

cigarette it is not considered smoking. I was told that by a doctor.

Q. Who?

A. Dr. Markowitz. He stated that on the stand here himself.

Q. But when did he tell you that?

A. 1994.

Q. When?

A. February.

Q. He told you that your smoking one to three cigarettes a day, that is not smoking?

A. Yes.

Q. In his report, you heard him testify that it was his understanding you were not smoking at all and he had no notation whatsoever that you were smoking one to three cigarettes a day?

A. But he did state that he thinks he remembers me saying that I do smoke occasionally, and he did state that it is not considered harmful.

Q. Let me ask you this: When Dr. Markowitz asked you whether you smoked, did you give him the same answer that you gave the lawyer for Metro-North when you gave your deposition?

A. I told him that I had stopped smoking, and I also told him that occasionally I will have a cigarette.

[773]

Q. And you told him you smoke one to three cigarettes a day?

A. Yes, I did.

Q. When you have these one to three, in that same rate you are smoking now, is that right?

A. Approximately, yes, sir.

Q. One to three.

A. Yes.

Q. When do you have these one to three cigarettes a day?

A. Whenever I feel like having it. If I feel like I want to have --

Q. Generally, tell me what time a day.

A. I don't know. Whenever I feel like having one, sir.

Q. In the evening?

A. Possibly. Sometimes in the morning, sometimes in the afternoon.

Q. What time in the morning?

A. Whenever the time I feel like having one, sir.

Q. First thing when you get up in the morning?

A. No. If I was going to have a cigarette, it wouldn't be until I left my house.

Q. What time of day was that, usually?

A. Usually? About 6 o'clock, 6:30.

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Q. Do you sometimes have a cigarette at 6 in the morning?

A. If I feel I need one, yes.

Q. Do you ever go to a coffee shop in the morning?

A. Yes, I do.

Q. And you have your breakfast there?

A. I don't have breakfast. I have coffee and --

Q. And when you go there, sometimes you buy cigarettes, don't you?

A. If I need it, if I need a pack of cigarettes, yes.

Q. In 1994, you have done that a couple of times, haven't you?

A. Yes, I have.

Q. And the name of the coffee shop --

A. The Last Stop.

Q. is The Last Stop Gourmet, isn't that right?

A. Exactly.

Q. And you buy Marlboros there, don't you?

A. Yes, I do.

Q. And right on those Marlboros it says you can get cancer if you smoke those cigarettes, doesn't it?

A. Yes, it does.

Q. Typically you go there in the morning, around 6 in the morning or so, 6:14, and you have a cigarette while

[775]

you are eating your breakfast?

A. No, not all the time, sir, because when your people do follow me, I don't always take the A train.

Q. Right. You knew that people were following you?

A. Oh, yes, without a doubt. I confronted your people many times when they were following me.

Q. But you didn't find that out until after your deposition, isn't that right?

A. No, I always had a feeling I was being followed. I expressed my concern to my attorney about it.

Q. So between the time of your deposition and now, you had to come up with some explanation for the fact that we had pictures of you smoking; right?

A. No, sir.

MR. GOETSCH: Objection, your Honor.

Q. So you got together with Mr. Goetsch and you came up with this one to three cigarettes a day, isn't that right?

A. That is not true.

Q. It is not? When did you tell Mr. Goetsch that you smoked?

A. When did I tell him?

Q. Yes.

A. Right after I made my deposition.

Q. And you were sent this deposition and you had the chance to make changes, weren't you?

A. Yes.

Q. You didn't change this answer, did you?

A. No, sir, because I --

Q. And Mr. Goetsch didn't advise you to change it, did he?

A. No, he didn't, because the fact that I don't feel that smoking one or two cigarettes a day has that much effect on it.

MR. LANDMAN: Move to strike as not responsive, your Honor.

THE COURT: I will allow it.

A. If I was so concerned about you people following me and taking pictures of me, I wouldn't have been smoking in front of them. But I knew they were following me. They would wait outside my house every day. I knew it.

Q. And you knew they were taking pictures of you buying cigarette packs?

A. They were following me, sir. I knew they were taking pictures of me. I knew they weren't following me just because they liked the way I looked.

Q. And sometimes you would smoke in the evening when you were out?

A. If I want to, yes.

Q. No, not if you want to. Do you? Yes or no.

[777]

A. If I want to.

Q. Do you? Yes or no.

THE COURT: He is suggesting that you are forced to smoke.

THE WITNESS: I know I am not forced. I smoke on my own. If I go out eating, if I feel like having a cigarette, I will have a cigarette, yes, sir.

Q. Not if you feel like. The question is, Mr. Buckley, do you smoke in the evening? Yes or no.

A. Not every evening, no, sir.

Q. Do you smoke in the evening? Yes or no.

A. Not every evening. Not every evening means not every evening, but some evenings, yes.

Q. And on the weekends you smoke sometimes when you are out, don't you?

A. Occasionally, yes.

Q. How often on the weekend?

A. I don't keep count, sir, but I am sure you can tell me.

Q. Mr. Buckley, you are on the fire brigade, isn't that right?

A. Yes, I am, sir.

Q. And you bum cigarettes from some of the guys on the fire brigade, don't you?

A. Occasionally, yes.

[778]

Q. Like every time you get together with them?

A. No, that is not true.

Q. How often?

A. Well, we get together once a month, sir, for a meeting. That's when we have our meet.

Q. And you bum cigarettes from them?

A. Yes, if I feel like having a cigarette during the meeting, yes.

Q. Mr. Buckley, sometimes you smoke a cigarette while you are waiting for the bus, right?

A. You know that.

Q. Yes or no.

A. Yes. I am not denying I smoke, sir.

Q. Mr. Buckley, if we hadn't gone out and gotten these pictures after your deposition, you wouldn't have denied you smoke, would you?

A. No, sir.

Q. But unfortunately our investigator got caught by you, isn't that right?

A. Well, the investigator wasn't that good. You should spend more money on a better investigator. He was pretty sloppy.

Q. I guess that's right.

A. Yes, sir.

Q. Some days you actually smoke more than 3

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cigarettes a day, don't you?

A. Yes, again, but if your investigator was truthful he would tell you that there are days when I don't smoke. Maybe those are the days you don't have

pictures of me smoking. Maybe three or four days go by when I don't have cigarettes.

Q. And some days you smoke six or seven cigarettes a day?

A. No, I wouldn't say that. Maybe. It's possible.

Q. Yes or no.

A. It's possible. I can't say yes, I can't say no. It's possible.

Q. Your wife is going in for a C section, you are told to come outside because she was going to get an epidural, and you --

A. I wasn't told to go outside. I was told to leave the hospital, go get air. Nobody said, go outside to me.

Q. During the C section surgery they told you just leave the whole building?

A. They told me to go out and get air. I was in the building for almost 19 hours straight.

Q. And you go out and you run into this nurse?

A. Yes.

Q. And she was smoking a cigarette and what do you say to her?

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A. I asked her if I could have one.

Q. And then all of a sudden you just started smoking again?

A. No, that was a pickup from her. I started smoking one.

Q. You told us when your son was born -- when you testified you may have made some reference to this yesterday -- that because of your fear of your cancer and what's going to happen, that you are very overprotective of your son and you really are careful with him. This son you are talking about is nine months old?

A. Eight months old.

Q. Don't you think it is a good idea to sort of be a little protective of an eight-month-old baby? I mean, what is it you want him to do, go out on the street corner and deliver newspapers?

A. I didn't say that, sir. I am just more careful about things he does.

Q. Like what? Give me one example.

A. Like picking things off the floor. I am more cautious, that he can't put something in his mouth.

Q. You don't let him eat paint chips?

A. I try not to.

Q. And before this all happened in Metro-North, you let him sit down in a corner and pick up some paint chips

[781]

and eat them, is that right?

A. No. As I said, I go out of my way to make sure that he is safe. I take extra precaution.

Q. And you think that is a bad thing for an eight-month-old?

A. Oh, no, it is a good thing.

Q. So you don't think that is something Metro-North caused you to do?

A. No, sir, but maybe I was a little more protective, a little more aware of things, hazards.

Q. But you agree it was good, then?

A. Of course. Wouldn't you?

Q. Mr. Buckley, the Marlboros that you spoke, do they have filters?

A. Yes, they do.

Q. And have you always smoked Marlboros?

A. Sometimes I would smoke a Parliament.

Q. You bum cigarettes from Bob Hennesey, don't you?

A. Yes, I do.

Q. Every time you see him at one of these fire meetings, you say, "Bob, do you have a cigarette?"

A. Once a month, yes.

Q. Do you ever give him a cigarette?

A. If I have one.

Q. And sometimes you bum up to three, four

[782]

cigarettes from him at a meeting, don't you?

A. No, sir. The meetings are only fifteen minutes long.

Q. How many cigarettes do you bum from him at the time that you see him?

A. Maybe one.

Q. Sometimes two?

A. Possibly.

Q. And what time of day do these meetings occur?

A. Usually about 3 o'clock in the afternoon.

Q. Now, when you went to -- you went to a Dr. Robert Sorgenti in Howard Beach, didn't you?

A. Correct. No, not recently. Last year.

Q. March 24?

A. March? Yes.

Q. And he is your personal physician?

A. No, he is not my personal physician.

Q. Why did you go to him?

A. Because with our insurance plan, we had an HMO, we had to pick a doctor in our area, and he was the closest doctor serving our area that came under my HMO plan.

Q. What was the purpose of going to him?

A. I wanted to have chest x-rays done.

Q. And you did get a chest x-ray?

A. Yes, I did.

[783]

Q. And the chest x-ray was negative?

A. Yes, it was.

Q. That was done by a Dr. Philip Carver?

A. Yes, it was.

Q. And your medical insurance paid for it?

A. Yes. But I still have the money that comes out -- I know I paid for it because I paid for my own insurance. HMO comes out of my pocket. I pay.

Q. Right. When you go there, the chest x-ray and the exam were covered by your HMO? Yes or no.

A. Yes, but I paid for my HMO. It is not given to me by Metro-North. I pay a monthly fee to HMO so it was out of my pocket.

Q. Are you saying that Metro-North doesn't contribute anything toward your medical coverage?

A. Of course they do but I also pay.

Q. They contribute and you contribute?

A. Yes.

Q. And pay your fringe benefits on the job?

A. Yes.

Q. When you went to see Dr. Sorgenti, you told him that you had been a former smoker and you used to smoke one pack a day for seven years, didn't you?

A. I possibly could have said that, yes.

Q. And that you stopped in 1991.

[784]

A. Right.

Q. And I guess that's because, the same thing with the Dr. Markowitz rule, if you smoke one to three cigarettes or maybe five or six, it is not really smoking?

A. That's right.

Q. Why did you pick seven years to tell him?

A. Because at the time that was just a number, you know, I said seven years, one pack a day. I was giving him an average.

Q. 1994 you told Dr. Markowitz -- I am sorry -- Dr. Herbert back in 1994 that you had been smoking for about 20 years?

A. Exactly.

Q. One pack a day or less or more. Now you go and you see a doctor in 1994 and you change it now to seven years. Was that because you thought we would end up getting these records?

A. No, sir, because I knew you were going to get records, so if I was going to do that, why would I lie on that? I knew you were going to obtain all my medical records and I know what was on everything else.

Q. You actually didn't know I was going to obtain all your medical records, did you, because this was March 24, 1994, your deposition was April 1994, and we asked you, did you have a regular doctor you went to, and you said no,

[785]

didn't you?

A. Exactly, well, I told --

Q. We asked you any doctors you went to and you didn't give us any names, so how did you think we would get those records?

A. Through HMO records.

Q. When the Metro-North lawyer asked you if you had gone to a regular doctor, why did you say no when you went to a doctor three weeks before?

A. Because it is not my regular doctor. They said, "Do you have a regular doctor?" and, like, I explained to you, I said no. You can check the records how many times I have been to him: one time.

Q. You told us that you get upset when you read about asbestos in the newspaper.

A. Yes, sir.

Q. And when you see it on TV.

A. Yes.

Q. And that is because it talks about cancer and all these terrible things, right?

A. Yes.

Q. And there is no question cancer is a terrible thing, right? Yes or no.

A. Yes, sir.

Q. There is a lot in the newspaper about cancer,

[786]

isn't there?

A. Yes, there is.

Q. There is a lot on TV about cancer?

A. Yes, there is.

Q. About diet, what you eat and things like that?

A. Yes.

Q. But probably the most that is in the newspaper and on TV is about the danger of smoking and cancer?

A. Correct.

Q. Does that upset you when you see that?

A. Yes, it does.

Q. How upset does it make you?

A. Very upset, knowing that I am addicted to a substance that is hard to kick.

Q. You are addicted to it but you control it to one a day.

A. Yes.

Q. Does reading about smoking and cancer make you more or less upset than reading about asbestos and cancer in the newspaper?

A. I try not to read about it.

Q. Which makes you more upset when you see it?

A. About equal.

Q. you are riding on a subway, you see an article about doctors say 90 percent of lung cancer cases are due to

[787]

smoking, and then you see an article that says, doctors say asbestos increases your risk of cancer. Which of those makes you more upset?

A. They are both the same.

Q. In fact, Mr. Buckley, you have done no reading about asbestos-related diseases except when you went to that course Metro-North made you go to, isn't that right?

A. Correct.

Q. And the first time you did learn anything about this, you claim, is when you went to this course on August 31, 1987? Yes?

A. Excuse me?

Q. The first time you claim you learned about asbestos and what it does to you and that asbestos was present was when you went to this course on August 31, 1987?

A. When I found out the full effects of asbestos, yes.

Q. August 31, 1987?

A. Yes.

Q. Had you learned something about asbestos before?

A. Just by word of mouth of employees.

Q. In fact, you knew there was asbestos down there in 1986, right?

A. No.

Q. You didn't?

[788]

A. We had asked about it and they told us no, it wasn't asbestos, it was magnesium.

Q. You saw all this, that is in evidence, this big survey that was done in the steam tunnel where they took 300 samples. You didn't see them detail any of those samples in 1986?

A. But they didn't come up to me to discuss the findings with me, no.

Q. And ycu never bothered to ask them anything?

A. Yes, we did. I just said, they told us it was magnesium.

Q. This is what the outside consultant said?

A. No, that is what our foreman said.

Q. But there were outside consultants taking these samples?

A. Yes.

Q. In fact, you and some of your buddies went and walked around with them and told them where to take the samples, didn't you?

A. Not me, no.

Q. But some of your buddies?

A. Possibly my coworkers.

Q. You never discussed with them that these guys were in there looking for asbestos?

A. They never mentioned anything to me of asbestos.

[789]

When we asked them what they were doing, my foreman at the time told me they were taking samples, and later on we asked them what the samples were; they said it was magnesium.

Q. Isn't it true that in 1986 you learned of the potential hazards of asbestos? Yes or no.

A. No.

Q. Question on page 39, line 4:

"Q. Did there ever come a time when you were made aware of the potential hazards of asbestos?

"A Yes.

"Q When was that?

"A I guess maybe 1986.

"Q How were you made aware of the potential hazards of asbestos?

"A People started telling us that it causes cancer.

"Q What people were they?

"A People that were in the -- work in the other shops. They used -- because they used to refer to us as snowmen. We used to be covered head to toe in white from it. People say do you know that stuff is going to kill you. We say what do you mean. Say, well, asbestos causes cancer. Then we started asking other people and -- go ahead, I am sorry."

Was that testimony correct or not?

[790]

A. Yes, it was. If you listen to what you said -

MR. GOETSCH: Objection, your Honor.

THE COURT: Wait a minute, your lawyer is trying to object. What is your objection?

MR. GOETSCH: Objection as to the rule of completeness, your Honor, pages 39 and 40, it goes on to say that he asked his foreman --

THE COURT: Do you want to read on?

MR. LANDMAN: I will be happy to, sure.

"Q Go ahead.

"A No.

"Q Who did you ask?

"A Asked our foreman. And he would tell us, yes, but it's not asbestos you're working with.

"Q What foreman was that?

"A Kevin Leverage.

"Q. Did anybody else tell you it was not asbestos you were working with?

"A Yes.

"Q Who else?

"A Carl Pale. I think it was a supervisor or assistant supervisor at the time.

"Q. Anybody else?

"A. Just foreman and the basic supervisor."

MR. GOETSCH: Thank you, your Honor.

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"Q. When did you first become aware yourself that the insulation you were working with was asbestos?

"A. When they started testing it.

"Q. Can you tell me when this was?

"A. Maybe 1986, 1987."

MR. GOETSCH: Continue, please.

A. Do you see what it said, though. Maybe. It didn't say definite. It said maybe. 1986 or 1987. It didn't say yes.

MR. LANDMAN: I am happy to read more if Mr. Goetsch wants me.

"Q. What, if anything, did you do when you became aware of the fact that you were working with asbestos?

"A. Start complaining. We said that, you know, we want to know more about it.

"Q. Did you yourself do anything to find out more about it?

"A. I personally, no. I was just -- I just asked the foreman at the time if this -- please stop, you know, until we found out more about it. You know, stop removing it."

MR. GOETSCH: Thank you, your Honor.

"Q. Did you ever go to a doctor and ask him about asbestos?

[792]

"A. No."

MR. GOETSCH: Please continue, then, on page 41, you went to the safety department.

MR. LANDMAN: I think this is redirect, but I will keep reading it if Mr. Goetsch -- it is up to your Honor.

THE COURT: I think probably you ought to read it on redirect.

MR. GOETSCH: Thank you.

Q. Now, in 1987 you did go to the school run by the asbestos company Envirosafe, is that right?

A. Yes, sir.

Q. At that class you saw a movie, isn't that right?

A. Yes, sir.

Q. And you also received a certificate or a piece of paper that states that you are now a competent person. Is that correct?

A. Yes. They considered me a competent person, yes.

Q. And stated that you had successfully completed the course for competent person training at the abatement safety training institute.

A. That's right.

Q. It didn't say anything that you are licensed to remove asbestos or anything, did it?

A. No.

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Q. And part of that course, an hour and a half, was covering the types, characteristics, and limitations of respiratory problems, and respiratory protection, selection, and fitting of respirators, respirator maintenance and recordkeeping. Is that right?

A. Possible.

Q. And in this film that you saw about asbestos, and you mentioned about the two main types of cancer that were in there, I think you said asbestosis and mesothelioma; is that right?

A. Yes, sir.

Q. They also told you, didn't they, that your cancer risk goes up dramatically if you smoke, isn't that right?

A. Yes.

Q. Maybe as much as 90 times as much?

A. 90 times? I don't remember seeing 90 times. If it is, I am sure you have it.

Q. And they said one of the best ways to reduce the risk from asbestos exposure is to stop smoking?

A. That's correct.

Q. And that was in 1987?

A. That's correct. (continued on next page)

[794]

BY MR. LANDMAN:

Q. You just kept smoking in 1991 when you went on the Dr. Markowitz no smoking plan?

A. Well, I wouldn't say it was the Dr. Markowitz no smoking plan.

Q. Okay. You did keep smoking until 1991?

A. Yes, sir.

Q. It is at that point in time when you saw that film when you got upset; is that right?

A. Yes.

Q. That is when all of this started; your emotional trauma?

A. I guess the beginning of it, yes, sir.

Q. That is the beginning of it; is that right, Mr. Buckley?

A. That is what I said.

Q. You don't go to a doctor then for another three or four years?

A. Metro-North sent us for a physical.

Q. That was conducted by the nurse?

A. The nurse, yes.

Q. 1989?

A. Yes.

Q. They did a pulmonary function test and a chest x-ray and all of that was fine?

[795]

A. Correct.

Q. You didn't believe any of that because you didn't trust anyone at Metro-North?

A. Correct.

Q. You didn't like the nurse. They sent you outside for an x-ray?

A. I never said I didn't like the nurse. Did I say that?

Q. You didn't like the fact that the nurse was the one who administered this pulmonary function test?

A. Exactly. I didn't say I didn't like the nurse. You are putting words in my mouth.

Q. When you went to Dr. Markowitz, he didn't perform the pulmonary function test either, did he?

A. No, he didn't. He had a qualified technician do it.

Q. You never got any medical exam for that; you were comfortable with that until after you hired Mr. Goetsch, isn't that correct, yes or no?

A. Yes.

Q. Your explanation yesterday for why you went to Mr. Cahill in part was you wanted Mr. Cahill to make a recommendation to you for a doctor; is that right?

A. Yes.

Q. You picked Mr. Cahill out because you thought he

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had some sort of special expertise with respect to picking doctors or because he was a buddy -- his father was a buddy of your father's?

A. That's right.

Q. There is no M.D. after Mr. Cahill's name; is there?

A. Not that I know of, no.

Q. Isn't it a little unusual to go to a lawyer from New Haven, Connecticut to find out who is a good pulmonary doctor in New York City?

A. It was a recommendation -- I asked him for a recommendation.

Q. You went to a lawyer in New Haven, Connecticut to get a recommendation for a pulmonary doctor?

A. They came to me.

Q. Where does Mr. Cahill practice?

A. In Connecticut.

Q. Until you hired Mr. Cahill you never went to a doctor and asked him about asbestos, did you?

A. No.

Q. Other than looking at that OSHA manual that was given at the asbestos awareness class, you did no other kind of research to determine whether or not, in fact, this fear you now had was a reality, did you, until you got a lawyer; yes or no?

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A. No. I had a concern about it.

Q. No. Listen to my question.

A. Go ahead.

Q. Other than looking at the manual that was given to you at that training class, and looking at the film, you did no other independent research to determine whether or not in fact this fear that you now had was or was not a reality; yes or no?

A. Possibly, yes.

Q. Possibly, yes?

A. Okay. Yes.

THE COURT: Of course, you answered a negative question. He meant, no, I did no other thing.

Q. Is that correct?

A. Yes.

Q. You have never gone to a doctor for any type of psychiatric treatment because of this emotional trauma?

A. No.

Q. You have never gone to a social worker?

A. No.

Q. You had never gone to a counselor to talk about this?

A. No.

Q. You have never been treated for this fear at all, basically?

[798]

A. No, sir.

Q. Is that correct?

A. Exactly.

Q. In fact, you heard Dr. Markowitz say that he doesn't think you have an emotional injury, didn't you, the other day?

A. What I believe he said was he didn't notice any psychological -- he didn't say he doesn't think or I don't have. He said, I do not believe I noticed.

Q. That is when he saw you in 1994; is that right?

A. Right.

Q. In fact, Mr. Buckley, you don't know of one pipefitter on the railroad in the period of time you have worked for the railroad who had either mesothelioma or asbestosis?

MR. GOETSCH: Objection.

THE WITNESS: No.

THE COURT: When a lawyer stands up, stop.

MR. GOETSCH: I objected to his question on the grounds of relevance.

MR. LANDMAN: The question is his fear.

MR. GOETSCH: About himself, your Honor, exactly.

MR. LANDMAN: Part of his fear would either be fueled or not fueled by the fact that either anyone who has ever worked for the railroad has ever come down with any of these diseases.

[799]

THE COURT: If he knows about it, yes.

Q. You don't know?

A. Because --

Q. You don't know one person, yes or no?

A. No.

Q. Mr. Buckley --

THE COURT: Again, you say, yes, I don't know one person.

Stop giving negative questions.

Q. Mr. Buckley, how many years have you worked for the railroad?

A. For Metro-North, ten years.

Q. No; for the railroads, I should say.

A. For the railroads?

Q. Yes.

A. Approximately, 22 years.

Q. You started 1973, right?

A. Exactly.

Q. Your dad worked for the railroad before you?

A. Yes, he did.

Q. How many years experience did he have with the railroad?

A. Possibly, 40.

Q. How long has he been retired?

[800]

A. Maybe eight years.

Q. He worked out of Grand Central, didn't he?

A. For a short period of time.

Q. Where else did he work out of?

A. He worked at Oak Point Yards; St. Ann Yards; Penn Station; New Haven, Connecticut; Stanford, Connecticut; New Rochelle; shall I continue?

Q. All of these places have pipefitters, don't they?

A. Possibly, yes.

Q. You have never checked, at least prior to your deposition, to see what the incidence of contracting asbestos-related diseases was among railroad workers; isn't that correct; you have never done any checking about that?

A. No, but have you?

MR. LANDMAN: Your Honor, move to strike as nonresponsive.

THE WITNESS: I am asking you. Maybe you can enlighten me on the subject.

THE COURT: You are not here to be enlightened.

THE WITNESS: I never did a survey; no, sir.

Q. Your friends in the back think this is funny, right?

MR. GOETSCH: Objection.

THE WITNESS: I don't know. They are not my friends. The are my co-workers.

[801]

Q. Okay. You said that?

A. And your people over there seem to think it is funny too because they are laughing also. Are they your friends or co-workers?

Q. Mr. Buckley, you said that the risk of getting cancer, you were told by Dr. Markowitz, was 5 to 8 percent greater than if you had --

A. That is a mistake. I know he said up to 5 percent.

Q. When you told this jury 5 to 8 percent, that was a mistake?

A. I am correcting myself now.

Q. When you heard Dr. Markowitz testify here he thought the risk was between 1 and 3 percent?

A. Possibly. He probably --

Q. Which is it?

A. I don't remember him saying that but if you say he did, I am going to have to take your word for it.

Q. What I want to know is what is your recollection sitting here now as to what he told you your increased risk is?

A. Up to 5 percent. I am almost positive he said that. I am sure you can correct me on that.

Q. Mr. Buckley, you don't know what that means because you don't know what other people's risk is, do you?

[802]

A. No, sir.

Q. In other words, you don't know whether 1 to 5 percent higher means 1 in 1 million or 1 in 20 million or any of that, do you?

A. No, sir. I just know it is a higher risk.

Q. You never bothered to determine what the risk is actually in terms of how many pipefitters ever have gotten asbestos-related diseases, have you?

A. I have never asked, no.

Q. You never bothered to determine how many pipefitters who only had exposure from two to three years ever got asbestos-related diseases, did you?

A. No, sir.

Q. Just so it is clear, not only did you go to a lawyer before you went to any doctor, you actually had become a plaintiff in this lawsuit in 1989; isn't that right?

MR. GOETSCH: Objection, your Honor.

THE COURT: That is not correct.

MR. GOETSCH: That is not correct.

Q. I am sorry, February 1990.

A. Yes, sir.

Q. The first person who was lead plaintiff was Mr. Giabobo?

A. Giammona.

[803]

Q. For some reason, he dropped out?

A. I believe so, yes.

Q. The next person who was a lead plaintiff was your friend Larry Brown, is that right?

A. Not my friend.

Q. Your co-worker?

A. Co-worker.

Q. He has dropped out too?

A. Yes. He has left the railroad.

Q. He fired Mr. Goetsch; is that right?

A. That, I don't know.

Q. Does Mr. Goetsch?

A. Is that not a client, what do you call, lawyer privilege?

Q. The next person who was supposed to be the lead plaintiff was a Mr. Nelson; isn't that right?

A. That's correct.

Q. He has dropped out now?

A. Yes.

Q. You are the next one on the list?

A. Apparently, yes.

Q. There is another 140 coming down the road; isn't that right?

A. Possibly.

Q. What I want to talk to you about is who is the

[804]

first one that went to Mr. Goetsch or Mr. Cahill or any of the lawyers up in New Haven?

A. I have no idea.

Q. Let me ask you this. When is the first time you met with Mr. Goetsch or Mr. Cahill?

A. I don't remember. It was possibly 1989, 1990, the first time I met him.

Q. At the time met with them, did they tell you they had already filed a lawsuit on behalf of other Metro-North employees?

A. I believe they did.

Q. So, you didn't get their name, though, from any of these co-workers?

A. No, I did not.

Q. You got it from your father?

A. Yes, sir.

Q. You would go to meet with Mr. Cahill at the Howard Johnson's; is that a hotel?

A. It is a restaurant. It used to be across the street from Grand Central.

Q. You sat in the coffee shop and talked to him about this?

A. For a few minutes, yes.

Q. Why don't you tell me what you said to him about your fear at that time?

[805]

A. What I told him about my fear at the time?

Q. Yes.

A. I don't remember offhand exactly but I know I expressed my concern about contracting some type of illness.

Q. This was in 1989?

A. I think it was 1990. I am not sure of the date exactly.

Q. What did he say to you?

A. He told me, would you like to see a doctor.

Q. Did he give you the name of the doctor at that time?

A. Not at that time, no.

Q. How long did it take him to get back to you?

A. I don't remember.

Q. A month?

A. I think it was longer than that.

Q. A couple of months?

A. Possibly.

Q. Was it up to three months?

A. I don't remember. I don't recall.

Q. You think it was a couple months?

A. Possibly.

Q. So I take it that Mr. Cahill didn't think this was a major concern where you were losing sleep or anything like that since it took him a couple months to get back to you.

[806]

MR. GOETSCH: Objection.

THE COURT: It is not his concern.

Q. Other than going to see these doctors on two different occasions at Mount Sinai you haven't done anything medically with respect to this concern you have, have you?

A. Going and seeing other doctors.

Q. Yes.

A. No, sir.

Q. Every time you went for any physical, whether it was related to asbestos or not, including at Mount Sinai, your chest x-rays have always been normal?

A. Yes.

Q. Your pulmonary function tests have always been normal?

A. Yes.

Q. You have never seen any medical evidence whatsoever that you have fibers in your lungs?

A. No medical evidence, no.

Q. No doctor ever suggested that they wanted to stick a bronchoscope into your lung and try to suck a fiber out?

A. No. They told me that is how it is done.

Q. You didn't want to have that done?

A. No, sir.

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Q. Nobody recommended that?

A. Nobody told me to have it done. They told me that is the way of determining it.

Q. Sitting here today as far as you know you have no asbestos-related disease, isn't that correct?

A. Not that I know, no, sir.

Q. You have no out of pocket expenses in connection with your consultation with the doctors regarding asbestos, do you?

A. No, but I know I will be held responsible for the bills.

Q. That was advanced by your lawyer?

A. Yes.

Q. You currently make how much an hour?

A. As a matter of fact, we just got a raise. I think I am making $19.73.

Q. $19.73 an hour?

A. Yes, sir.

Q. When you told this jury you were making $10 an hour, what time period were you referring to?

A. That was 1985 because when you start on Metro-North you start on a five year program. You start at 70 percent of pay and at the time the pay scale was $15 and change an hour so I was only making 70 percent of that amount of money.

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Q. And it gradually went up?

A. Yes.

Q. Now you are up to almost $20 an hour?

A. Yes, sir.

Q. You also make overtime, isn't that right?

A. Occasionally, yes.

Q. We had some testimony from some of your co-workers about overtime. When overtime is available, you work it; isn't that right?

A. Not all of it, no.

Q. Sometimes you do work overtime when it is available?

A. If it is available, yes.

Q. When you work overtime you make about $30 an hour?

A. Yes.

Q. You also get fringe benefits; isn't that right?

A. What do you mean by "fringe benefits"?

Q. You get vacation, you get insurance, you get sick leave and things like that?

A. No; that is not true.

Q. You don't get vacation?

A. I get vacation but there is no sick leave.

Q. You get a contribution to medical insurance?

A. Yes.

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Q. You get railroad retirement board benefits?

A. I contribute to it.

Q. The railroad puts in a lot higher percent than you do?

A. Possibly, yes.

Q. Possibly. You have been working for the railroad for 20 years?

A. 22 years.

Q. You have no idea whether the railroad contributes more to your pension than you do?

A. I am sure they do, but that is an agreement between the unions and the railroad, not between me and the railroad. That agreement has been there for many years, sir.

Q. Is it your testimony, Mr. Buckley, that from 1987 to 1990 even though you had this fear and emotional trauma and everything that the reason you never got a medical exam until you hired a lawyer was because you couldn't afford it or because you didn't know who to go to, which is it?

A. A little of both.

Q. The medical exam, you heard Dr. Markowitz say, cost about $150 for his exam?

A. Correct.

Q. Your testimony is you couldn't afford $150 for this big concern you had?

[810]

A. I don't remember how much he said the test was. I think it was more than $150.

Q. Whatever it is, you couldn't afford it?

A. No. You don't know what my expenses are. You don't -- I am sure maybe you do, you dug so deep, but you don't know what my life is like, you don't know what expenses I have.

Q. I know --

A. That is why you bring up the fact how much money I make. You don't know how much money I have in the bank, what expenses I have.

Q. You brought up how much you made yesterday when your lawyer asked you and you said $10 an hour?

A. You brought up the fact today I am making almost $20 an hour.

Q. You don't think the jury ought to hear the whole story?

A. Fine. Let them hear the whole story.

Q. As part of your EMT responsibility you said you get upset when you take care of the cancer patients?

A. Not on the railroad, but on the outside, yes.

Q. You do part time work for an ambulance service?

A. One ambulance service.

Q. Metropolitan?

A. Yes.

[811]

Q. How much do you make on a given day for that?

A. $10 an hour.

Q. You do that on the weekends?

A. One day a week.

Q. Mr. Buckley, when you are doing that sometimes you are smoking, aren't you?

A. I will have a cigarette. Like I said, I will smoke a cigarette occasionally, yes.

Q. Metro-North paid for all your training to become an EMT specialist, didn't they?

A. Yes, they did.

Q. Now you are able to use that expertise to work on the outside, part time; isn't that right?

A. Part time, yes. They also taught me plumbing work and I do plumbing work on the outside too.

Q. How often do you do that?

A. Very rarely.

Q. You work around boilers and things like that?

A. No.

Q. What kind of plumbing work do you do?

A. Just mostly a toilet or sink.

Q. As part of this EMT work that you do, you also have to deal with heart attack victims, don't you?

A. Yes, I do.

Q. Does that upset you as much as cancer?

[812]

A. Yes, it does. Any person that is sick upsets me.

Q. You have been told you have high cholesterol; isn't that right?

A. Years ago, yes.

Q. 1990, when you went to Mount Sinai --

A. That was five years ago. That was years ago.

Q. You were told then?

A. Yes.

Q. You know that heart disease is the largest killer in the United States?

A. That is what they say, yes.

Q. Do you have a concern about that?

A. Do I have a concern about what?

Q. That you may die of heart disease some day?

A. I can't be paranoid about everything but, yes, I do think of it.

Q. Only about some things?

A. Yes. They say eating red meat causes high cholesterol but I still eat red meat.

Q. You mentioned yesterday that first you went to another lawyer before you went to Mr. Cahill. That was Mr. McCarthy of Graham, Campagne & McCarthy?

A. Right.

Q. He said he didn't want your case?

A. I don't believe he said that.

Q. He said he wasn't interested in it?

[812]

A. No. I don't think he said that, but that is privileged information no matter what he said to me.

Q. He wasn't your lawyer?

A. If I came to you and discussed a case with you, would you go out and tell everybody what I discussed with you?

Q. What I am asking you is, did he tell you, yes or no, did he tell you that he would not take your case?

A. I don't remember exactly what he said.

Q. Did you go out and recruit some of your co-workers to join this lawsuit?

A. No, sir.

Q. You didn't talk to anyone about it?

A. No, sir.

Q. You didn't say to anyone, let's having a meeting; there is going to be a meeting at a hotel?

A. No. I didn't go to a hotel for a meeting.

Q. Did you ever go to a hotel for a meeting?

A. No, sir.

Q. Was anyone with you when you went and talked to Mr. Cahill at that Howard Johnson's?

A. Yes, there was.

Q. Who?

A. I believe it was either -- I think it was my union

[814]

representative, Paul Muro, he walked me across.

Q. Anyone else?

A. No, not that I remember.

Q. Do you know what Mr. Muro's relationship is with Mr. Cahill or Mr. Goetsch?

A. I think he is also a client on the asbestos lawsuit.

Q. You really don't like Mr. Palmer, do you?

A. What do you mean by "like"?

Q. Yesterday you wanted to have him locked up. Mr. Palmer was the superintendent at Grand Central Terminal?

A. Exactly.

Q. Do you like him?

A. Do I like him; not particularly, no, sir.

Q. You don't like your job; isn't that right?

A. I like my job, sir. I never stated I didn't like my job.

Q. I thought you said you hate your job yesterday.

A. No. I hate the way it is run. I know what you are saying but right now I like doing the type of work but I do not like having to do it under the conditions I have done it and it just makes me angry.

Q. Did you say yesterday that you hated your job?

[815]

A. Possibly, maybe out of anger, I said it.

Q. Mr. Buckley, just so everyone understands this, you are doing basically the same job you were doing in 1987, right?

A. No.

Q. How has your job changed?

A. Well, number 1, we are not removing asbestos anymore. Any time there is asbestos in the area we have to work in, we won't go down into the area until it is cleaned up and we have an air test.

Q. You are working in the same environment?

A. Yes.

Q. Your responsibilities are generally the same except for asbestos?

A. Exactly.

Q. You are still at Grand Central?

A. Yes.

Q. When you go into that steam tunnel everyday you have a reminder about what happened; isn't that right?

A. Yes.

Q. How does that make you feel?

A. Mad.

Q. You know you got 23 years seniority on the railroad so --

A. No. You are wrong. You are wrong. You are jumping the gun. When I left -- when I left Conrail I had

[816]

to resign and I started as a new employee on Metro-North so I don't have 23 years.

Q. You have ten years experience?

A. Ten years.

Q. A lot of people have left during that 10-year period?

A. Yes.

Q. Mr. Nelson has, Mr. Brown has?

A. What do you mean, they left?

Q. They are gone from the railroad?

A. No. You are wrong.

Q. Isn't Mr. Brown --

A. Mr. Brown, but Mr. Nelson is still there.

Q. He just dropped out of the lawsuit. I misunderstood what you said.

A. You didn't ask me if Mr. Nelson left the railroad.

Q. Mr. Nelson just dropped out of this lawsuit?

A. Yes.

Q. Essentially, in 1987 you were assigned to the pipe shop Track 100 area?

A. Correct.

Q. That is at the lower level of Grand Central?

A. Right, yes; lower level, yes.

Q. You still work there today; isn't that right?

[817]

A. Correct.

Q. Same location?

A. Same location.

MR. LANDMAN: Your Honor, I don't know if you want to take a morning break or should I keep going?

THE COURT: You think a break would be good at this point?

MR. LANDMAN: I think so because we are moving into a new area.

THE COURT: Okay. Why don't we take a short recess?

(The jury leaves the courtroom)

MR. LANDMAN: Your Honor, the reason I wanted to take a break is I have the memo of law and I wanted to give it to you now that we are going to rely on in support of our motion.

THE COURT: Okay.

(Recess)

THE COURT: Please proceed.

BY MR. LANDMAN:

Q. Mr. Buckley, you testified a little bit about when you started at Metro-North you only got 70 percent of your pay?

A. Exactly.

Q. Isn't it a fact by 1986 you had taken a grievance

[818]

and because you provided evidence of four years as a plumber with Conrail you were considered a journeyman and your pay was adjusted upward?

A. Yes, it was.

Q. They gave you seniority for those four years also; isn't that right?

A. What do you mean by "seniority," sir?

Q. They gave you seniority for the time you were with Conrail?

A. No, they did not. I started as a new employee.

Q. This $10 an hour you talked about was only for less than a year?

A. After one year it went up 5 percent or 10 percent, I believe. Because I was a journeyman, I went up 10 percent, 10 percent until I was up to 100 percent pay.

Q. After the first year you started there you worked in the service plant, the refrigeration plant and underneath the tracks; isn't that right?

A. Correct.

Q. Sometimes you would go to escort the meter man from the operations department to check on the Con Ed steam stations in Grand Central, wouldn't you?

A. Yes, sir.

Q. Sometimes you would go with Vanguard to change the meters?

[819]

A. Yes.

Q. When you changed the meters that doesn't have anything to do with asbestos, does it?

A. They are located in -- the steam meters are located in steam areas in west tunnel, in the 49th and 43rd Street meter rooms.

Q. You are not cutting and removing insulation when you are changing a meter, yes or no?

A. If you have to change the line, it is involved.

Q. What about if you are changing the meter?

A. I wouldn't change the meter myself. It would be up to the Vanguard Company to change the meter.

Q. You are basically showing them where to work?

A. Possibly. It takes about 10 minutes to change a meter.

Q. Vanguard is an outside contractor?

A. Exactly.

Q. You agree that this is your signature on Exhibit F, the sheet where you attended the 3M respirator class in the 1987; isn't that right?

A. Yes, it is.

Q. In fact, three weeks before that you had an OSHA compliance exam by the medical department for respirator use, didn't you; do you remember that?

A. It was an OSHA compliance to see if I was able to

[820]

wear a respirator.

Q. You went to the medical department for that?

A. Exactly.

Q. They sent you out for an x-ray; isn't that right?

A. Yes, they did.

Q. Everything was normal?

A. Yes.

Q. Just so we understand, in January 1987 you go to the medical department, they check you out for a respirator, they say you are physically all right to use one, then you go to this class in February, is that right?

A. Yes.

Q. You now claim that the first time you were actually ever fit for a respirator was in 1989 at Grand Central, is that right?

A. I believe so, yes.

Q. But, in fact, in addition to attending this class, after -- when you went to this 1987, August 31, 1987 asbestos awareness class, they gave you half mask respirators; isn't that right?

A. Exactly, they gave them to us.

Q. We just went over the curriculum and you saw a couple of movies there, didn't you; isn't that right?

A. Yes. Yes, we did.

Q. After you got that respirator on August 31, 1987,

[821]

you used that sometimes when you were removing asbestos, isn't that right?

A. Yes.

Q. It actually had straps to tighten it, if necessary; didn't it?

A. Yes, it did.

THE COURT: I didn't get that.

MR. LANDMAN: It had straps to tighten it, if necessary.

Q. If there was friable asbestos in the area, you would use the respirator; isn't that right?

A. Yes.

Q. You were talking about this job with Mr. Goetsch yesterday where you had to remove 16 bolts and, you know, I can't remember now, was that on a flange or what was that on?

A. It wouldn't make any difference if it was a flange or valve. Flanges and valves all have bolts.

Q. What I want to do is pinpoint this particular job you were describing.

A. Okay.

Q. Tell me where it was located.

A. The one particular job I was talking about was in the 49th Street meeter room where we had to remove the expansion joint.

[822]

Q. What time of year was this?

A. Gee, I don't remember, Sir.

Q. What year?

A. '86, I believe.

Q. You had to take off these 16 bolts; isn't that right?

A. On each side, yes.

Q. There is 32?

A. 32 bolts altogether.

Q. How do you do that?

A. With wrenches.

Q. Each one?

A. Yes.

Q. How long does that take?

A. That all depends.

Q. How long did it take you that day?

A. I don't remember exactly how long it took me that day but sometimes bolts -- the nuts, as you know, would stretch from heat and so sometimes they would have to be cut off.

Q. It could take you all day to just get half of them off, right?

A. No, I wouldn't say that.

Q. How long would you say?

A. For 16 bolts, if we were having problems with them we would cut them off.

Q. How long would that take?

A. A few hours.

Q. Then you would have to do the other 16?

A. Yes, sir.

Q. How many people worked on that Biltmore project with you that you talked about yesterday?

A. About four that I can think of.

Q. How many?

A. About four that I can think of.

Q. How much does three foot of pipe weigh based upon the pipe that you were removing there?

A. The pipe that is in there is considered schedule 80 which is extra heavy pipe. A three foot section of eight inch pipe would probably weigh 150 pounds.

Q. You remember meeting Roy Balzer back in July of 1994 when you went on a tour of the Grand Central Terminal steam tunnels with Dr. Nicholson?

A. Yes. I don't remember who it was but I remember going on a tour.

Q. You remember telling some people down there that you used to change your clothes three or four times a day because it was so hot?

A. Exactly.

Q. That would include your underwear?

[824]

A. Yes.

Q. Also you said sometimes it was so hot you would only work in the tunnel for 40 minutes at a time?

A. I didn't say in the tunnel. I said we would only work 40 minutes at a time and we would have to sit and take a break.

Q. Once Metro-North found out there was asbestos in 1987 in the tunnels, they stopped you from working in the area, didn't they?

A. No, they did not.

Q. They didn't?

A. No.

Q. Isn't it true that once you found that there was friable asbestos in that area that it was taken care of by an outside consultant?

A. In 1987?

Q. Yes.

A. No, sir.

Q. Clearly, Metro-North knew by 1987 that there was asbestos in the steam tunnel, right?

A. Yes.

Q. Page 30, line 24: Reading from your deposition:

"Q Do you know of your own knowledge whether any of the material you handled had asbestos in it?

"A Yes, I do.

[825]

"Q. How do you know that?

"A. Because when we -- later on, when I along with my fellow employees were concerned about the asbestos, they finally started taking pieces of it, having it sent out and analyzing, yes, it did turn out to be asbestos.

"Q When you say "they" --

"A Metro-North safety department.

"Q Took out pieces of asbestos?

"A Of asbestos. They had an asbestos testing firm. They do bore samples into the asbestos and when they found out that it was asbestos they more or less stopped" -sorry, "they more or less started stopping us from working in the area.

"Q. So, did there come a time when you didn't work with asbestos any longer; is that correct?

"A. I still worked with it but if it was a friable situation where the asbestos was hanging off a pipe, no, we could not. We finally decided, no, we would not do it anymore.

"Q. At some time Metro-North had friable asbestos. This was discovered and taken care of by an outside consultant?

"A Yes.

"Q Do you recall when that was?

"A The first time I believe I saw an asbestos

[826]

company on the property was possibly 1988, 1989, the first time we actually saw a company called Envirosafe."

Was that your testimony?

A. Yes, if it is there, it is.

Q. In fact, you saw the exhibit in this court where the testing was actually done in 1986, isn't that correct?

A. The testing was done, but what you were asking me was if I saw or if I was still working with it in 1987. I said, yes, I was.

You didn't say anything about was the company there and removing it. They were just doing samples.

Q. You disagree with what Mr. Gropper said yesterday about when Envirosafe started removing asbestos?

A. Well, I know when Envirosafe was removing asbestos they were doing big projects and I was still removing asbestos.

Q. We are in agreement that Envirosafe was the asbestos abatement company you were referring to; isn't that right?

A. I am not sure what year they were there but I know when they were there we were still removing it.

Q. Mr. Goetsch asked you some questions about on-the-job injuries?

A. Yes, sir.

Q. You had some on-the-job injuries?

[827]

A. Yes, a few.

Q. He brought up the fact that you never filed a lawsuit until this one?

A. Yes.

Q. You have hired a lawyer before?

A. I hired a lawyer. I said I was never in court.

Q. I am asking you a different question now. You hired a lawyer and made claims against the company and have been paid for those claims?

A. Yes. I hired a lawyer one time.

Q. You also made claims to the claims department four or five times where they settled with you without a lawyer?

A. Yes, for a lost time injury.

Q. In fact, you had an on-the-job accident with Conrail, right?

A. I believe so, yes.

Q. Where you fractured your foot?

A. Yes.

Q. You made a claim for that?

A. Yes.

Q. You got paid for that?

A. They paid me for my lost time.

Q. The lawyer you hired before was Mr. Flan for another claim?

[828]

A. Yes.

A. Yes.

Q. In 1987 you were angry about what had happened; is that right; after you saw the film?

A. Yes.

Q. When did the fighting with your wife start? You testified yesterday that you fight with your wife now because of this?

A. Well, because -- when I said I was fighting with my wife, we argue a lot now because of the trial, when I first became the plaintiff.

Q. You argue because of the lawsuit, not because of the exposure?

A. Because I talk about it a lot.

Q. The lawsuit?

A. Yes, sir.

Q. It is right now the most important thing going on?

A. No, it is not.

Q. It is an important thing?

A. It is a serious thing. I guess it is important, Yes.

Q. When you testified yesterday about the fights with your wife, that had to do with this lawsuit?

A. I didn't say "fights." I said I lost my temper lot. I argued with her.

[829]

Q. That has to do with this lawsuit, not with respect to your exposure?

A. Maybe a combination of the two.

Q. How long have you been arguing say, you yell at your wife?

A. Yes.

Q. How long have you been yelling at your wife?

A. For a few months now.

Q. As this lawsuit got closer?

A. Yes, because of the -- well --

Q. This lawsuit was originally scheduled to be tried in November 1994 and because the judge had a criminal case, it got put over until this time?

A. Correct.

Q. You knew about that trial coming up in November 1994?

A. Yes.

Q. Because you couldn't have been fighting with your wife after you saw that movie because you didn't even meet her until 1988, isn't that right?

A. That's correct, yes.

Q. You got married in 1989?

A. That's correct, yes.

Q. You were out of work from June 7 to June 12, 1987 with an injury, weren't you; that was the one to your right

[830]

hand?

A. What was the date again?

Q. June 7 to June 12, 1987.

A. No. I never lost any time for that injury. I was on light duty.

Q. What does "light duty" mean?

A. You show up for work and you do work around the shop or around the office or they give you sweeping details.

Q. You wouldn't be doing asbestos insulation removal?

A. I would be down with the people.

Q. You wouldn't be doing the work?

A. I would be helping cleaning up.

Q. Don't the laborers usually do the cleanup?

A. Sometimes they do. It all depends what area it was in.

Q. Aren't there rules what a pipefitter can do versus what a laborer can do?

A. I clean up after my own men. We clean our own tools off.

Q. Clean up your own tools?

A. Yes, exactly.

Q. You also had light duty again on July 23, 1987 because you had a strain of your right foot, isn't that right?

[831]

A. Yes.

Q. You were wearing a soft cast?

A. Yes.

Q. How long did you have light duty then?

A. I don't believe I had light duty for that long. I think it was maybe just a few days.

Q. In 1988, on June 13, you were contacted by Mr. Macaluso with respect to excessive absenteeism and he discussed the absenteeism policy with you and you indicated to him that your record will improve.

You were aware of the concern the company had about your continued absenteeism in that you would attempt to avoid any further problems, is that right?

A. Yes, sir.

Q. That was on June 13, 1988; is that right?

A. Right.

Q. You had also been cited for excessive absenteeism in 1987?

A. I was talked to about it, yes.

Q. You got a letter from Mr. Gropper about it?

A. Yes, I did.

MR. GOETSCH: Your Honor, could we have a sidebar?

THE COURT: Yes. (Continued on next page)

(In the robing room)

MR. LANDMAN: Exhibit H --

MR. GOETSCH: Your Honor, these are precisely the attendance records that I asked him whether he was going to be introducing and he said he wasn't. Here they are now for the first time produced to me.

MR. LANDMAN: Let me just say -- that is not true. What I said is '85, '86, '87. This is 1988. It is in the personnel file that I produced to you. That is right where I got it out of.

MR. GOETSCH: The motion went to any and all attendance records.

MR. LANDMAN: You have these in your personnel file.

MR. GOETSCH: No, I don't. I will show it to you.

MR. LANDMAN: We will resolve that. Let's hold off on that. I know they are in the file. If it is a problem, it is not a big deal. Let's just move on.

THE COURT: You withdraw that?

MR. LANDMAN: Yes.

THE COURT: I can't be reversed on that ruling. (Continued on next page)

[833]

(In open court) BY MR. LANDMAN:

Q. Mr. Buckley, why were you missing so much time in 1988 that caused you to have this discussion about absenteeism?

A. Personal problems.

Q. You were sick a lot?

A. I said it was personal problems.

Q. Did your attendance get better after June 1988?

A. Yes, it did.

Q. In 1986, from January 29 to February 5, you were out because of an injury you suffered while inspecting fire extinguishers, isn't that correct?

A. Correct.

Q. Inspecting fire extinguishers was part of your job down there, right?

A. On occasion, yes.

Q. It was in 1986?

A. On occasion, yes.

Q. In 1989 you did have a physical exam at Metro-North; isn't that right?

A. Yes.

Q. They did a chest x-ray?

A. Yes.

Q. That didn't show any problem at all?

[834]

A. No.

THE COURT: Yes, it didn't.

MR. LANDMAN: I am sorry, your Honor.

THE WITNESS: Yes, it didn't.

Q. In 1992, Metro-North gave you a pulmonary function test?

A. Possibly; I don't remember that one, no.

Q. Let me show you and see if this refreshes your recollection.

A. Fine. Okay.

Q. That was normal; is that right?

A. I guess so.

Q. In 1989 you had also had a pulmonary function test that was normal; isn't that right?

A. Yes.

Q. In 1992, November 6, 1992 when you went to Metro-North for your periodic medical, you responded that you had stopped smoking in 1990; is that right?

A. 1990, 1991, whatever it was.

Q. Next to your signature it says you stopped smoking two years?

A. Well, maybe I exaggerated a little bit.

Q. In 1992 you also went to Metro-North to get a medical exam with respect to your fire brigade duties; is that right?

[835]

A. Yes. That was required by OSHA.

Q. How often do you have to go get an exam to be a fireman?

A. Just that once so -- because we were going to go for training and they wanted to make sure before we went for the training that we were physically fit.

Q. In 1985 you had a medical exam at Metro-North where they found that your triglycerides were elevated, isn't that right?

A. What is triglycerides?

Q. Cholesterol.

A. Okay.

Q. Did they tell you that?

A. No.

Q. You know you had a couple high cholesterol tests in Mount Sinai?

A. One that I was told about, yes.

Q. In October 1989 you had what is called a B reading; isn't that right; an x-ray, and they found no evidence of any type of lung disease at Metro-North?

A. I was never told that. I know had an x-ray but they never gave me the results of them.

Q. November 7, 1990 you had a chest x-ray at the Life Extension Institute; isn't that right?

A. I guess so, yes.

[836]

Q. That is at 437 Madison Avenue?

A. Yes.

Q. Is that near Grand Central?

A. I think it is -- it is near.

Q. A couple blocks?

A. More than a couple blocks. A couple blocks is two blocks.

Q. How many blocks?

A. Maybe six.

Q. Metro-North sent you over there for a chest x-ray; isn't that right?

A. Yes.

Q. That chest x-ray was normal?

A. I guess it was. They never gave me the results, as I said.

Q. Didn't, Mr. Buckley, in fact, you receive some of your x-rays in January 1990?

A. I don't recall, no.

Q. After you hired Mr. Cahill and Mr. Goetsch, didn't you go up to the medical department and say I want my x-rays?

A. I believe I did.

Q. Didn't they give them to you?

A. I don't believe they did, no.

Q. You don't believe they did?

[837]

A. What I believe is I think they wanted us to pay for them or something like that; somewhere in that area.

Q. You didn't sign a paper saying that you were receiving them?

A. I think I did sign a paper, yes.

Q. You wouldn't sign that unless you were getting them, would you?

A. No. What the paper -- we were asked to sign the paper as a release and we were supposed to go over and pick them up at the place where we had the x-rays taken but they wanted us to pay for them.

Q. Did you ever do that?

A. No.

Q. The reason is because you didn't want to pay for them?

A. I felt that I shouldn't have to pay for x-rays.

Q. I would just like to show you Exhibit G which had been marked for identification.

You would agree, Mr. Buckley, that this states, on January 16, 1990, "I have received my x-rays from the Metro-North medical department in Grand Central Terminal and I am aware that I would be billed a charge from Corporate Health Life Extension. These x-rays now belong to me."

It has your signature?

A. Yes.

Q. That is your signature?

A. It is my signature but, like I said, we were supposed to take this paper over with us and they were going to give it to us. If you find a bill from this company -- I never received a bill from them because I never picked up the x-rays.

Q. This company, Corporate Health Life Extension is not Metro-North, is it; it is a private company?

A. Yes, it is.

Q. What Metro-North is basically saying is, yes, you can have your x-rays but you have to pay for them, and you decided not to pay for them?

A. They told us it is about $50 for the x-ray; yes.

Q. This is about three years now after you have this concern about the exposure and the risk and you didn't want to spend the $50 to get the x-rays?

A. What year was this?

Q. 1990.

A. Because I was going to go to my own doctor.

Q. Dr. Markowitz?

A. Not my doctor.

Q. Mr. Cahill's doctor?

A. Right. I figured I wanted an updated version of my x-rays, not one that was old.

Q. Was that based upon medical advice you got from

[839]

Mr. Goetsch or Mr. Cahill or who?

A. No. It just makes common sense. If you go to a dentist and had x-rays a year ago, wouldn't you want new x-rays?

Q. Don't you think it is helpful to a doctor to see if there is any changes in your lungs and, therefore, it may be useful to have prior x-rays?

A. If they take an x-ray they can tell.

Q. They can tell when something developed?

A. There is something developing.

Q. This was, obviously, when you wanted these x-rays was after you had already hired Mr. Goetsch?

A. It could have been, yes. I am not sure exactly.

Q. Did Mr. Cahill or Mr. Goetsch tell you you ought to get your x-rays for your lawsuit?

A. No.

THE COURT: Is this document in evidence?

MR. LANDMAN: I am moving it in evidence, your Honor.

THE COURT: Any objection?

MR. GOETSCH: No objection, your Honor.

THE COURT: Received.

(Defendant's Exhibit G for identification was received in evidence)

Q. On November 6, 1992 you had chest x-rays that

[840]

Metro-North paid for at a company called EHG; isn't that right?

A. Could you tell me where EHG is located and I could tell you?

Q. Midtown clinic.

A. Could you give me the address?

Q. I don't have the address?

A. If you told me the address it would be more helpful.

Q. On November 6, 1992 do you remember going somewhere to get a chest x-ray?

A. I have been to so many chest x-rays I don't remember.

Q. You had a lot of them?

A. You have shown me I had a lot of them.

Q. Metro-North paid for all of these?

A. Yes, they did, yes.

MR. LANDMAN: Your Honor, we would offer Exhibit H in evidence, the report of the November 6, 1992 x-ray exam which is contained in Mr. Buckley's personnel file.

THE COURT: Any objection?

MR. GOETSCH: No, objection, your Honor.

THE COURT: Received.

(Defendant's Exhibit H for identification was received in evidence)

[841]

Q. Mr. Buckley, let's talk for a brief moment about your fireman duties. You received a lot of training to become a fireman; isn't that right?

A. In 1993, yes.

Q. You have been a fireman since 1988 or 1989?

A. 1988.

Q. No one put a gun to your head and said, look, you have to be on the fire brigade, did they?

A. No, sir, it is completely voluntary.

Q. As part of your training over the course of time, you received various workbooks and things like that about fire fighting?

A. We never had any formal training, as I said, before 1993.

Q. When you had the training in 1993 they talked to you about hazardous substances, isn't that right?

A. Yes, they did.

Q. They basically explained to you things such as the very nature of fire fighting requires work in an environment that is heavily saturated with toxic vapors and products of combustion; isn't that right?

A. Yes.

Q. You knew that toxic vapors means poisonous air?

A. Exactly.

[842]

Q. These vapors and byproducts of fire have a very bad effect or detrimental effect on the circulatory and respiratory system of the body?

A. If you are not protected, yes.

Q. You knew that?

A. Yes.

Q. You still are a fireman, isn't that right?

A. Yes.

Q. In fact, recently you have taken some more training to become an EMT operator?

A. Emergency medical technician, correct.

Q. As part of that, in addition to being trained about all of these hazardous substances, I assume you were trained about vinyl chloride and what happens when that burns?

A. Yes.

Q. At Metro-North you have a lot of signal wire and other types of wire on the equipment and on the tracks and some of that has got plastic covering which has vinyl chloride in it?

A. Yes.

Q. You know if that burns that can give off hazardous fumes?

A. Yes.

Q. A lot of the fires you fight are actually out on

[843]

the tracks and things like that where some of this wire may actually be burning?

A. Yes.

Q. You also know, of course, even though the asbestos has been encapsulated now at Grand Central that like this building and 75 percent of the buildings in the United States, there is still asbestos in Grand Central?

A. Yes, there is.

Q. If there is a fire you may get exposed to asbestos?

A. If there is a fire in the area, I am protected.

Q. Isn't it true that once a fire is over, one of the jobs of a fireman is doing what is basically called "overhaul"?

A. No. You see you are getting it wrong. When there is a fire at Grand Central Terminal we contain the fire until the New York City Fire Department comes and they take over.

Q. You are the first person on the scene?

A. We are the first response, yes.

Q. You could be exposed to fumes at that time?

A. No, no, because if there is a fire they have a very strict rule that when you approach a place where there might be a fire you must have your full face respirator on with an air pack.

[844]

Q. You always follow that rule?

A. Yes, because if you don't you will be dismissed from the fire brigade.

Q. As part of your EMT training, one of the things you had to be trained about is giving mouth-to-mouth resuscitation?

A. You don't give mouth-to-mouth resuscitation anymore.

Q. Because of the health hazards?

A. Exactly.

Q. You were also trained about bloodborne pathogens?

A. Exactly.

Q. That is transmission of disease because the person who you may be assisting's blood may get in your own blood?

A. Only if you have an open wound or if you do mouth-to-mouth resuscitation, yes, otherwise you are just about 100 percent protected.

Q. In fact, aren't you required to get a hepatitis vaccine?

A. You are not required. If you read the law it says it is not mandatory. They cannot force it. It is only given to you as a precaution.

Q. You can do that?

A. Yes, I did.

[845]

Q. One of the risks you have now is hepatitis?

A. Not only from there but working in the plumbing shop, we also have a risk of contracting hepatitis, working in an open sewer main.

Q. Also you know that you have a risk as an EMT operator to tuberculosis?

A. Everybody has a risk of tuberculosis because you can catch tuberculosis from somebody that is active, that has tuberculosis or from a crowded subway. I am at no more risk than anyone else if you follow the guidelines.

Q. When you applied to work at Metropolitan Ambulance in Brooklyn you stated that you have no medical problems at all, isn't that correct?

A. That's correct, exactly.

Q. Also you signed a piece of paper recently from Metropolitan which states as follows: "I understand that due to my occupational exposure," meaning working for the ambulance company?

A. Exactly.

Q. "To blood or other potentially infectious materials I may be at risk of acquiring hepatitis B virus infection;" did you sign that?

A. Yes, I did.

Q. You knew what it meant?

A. Yes.

[846]

Q. What did you mean by potentially infectious materials?

A. Working in a hospital you can get stuck by a needle because we go to a lot of hospitals. We are at a lot of scenes where there has been a lot of needles on the scene and when you are picking up a patient you may get stuck by one of them.

Q. You testified that you make $10 an hour doing this?

A. Yes, sir.

Q. Don't you usually make about $170, $180 per day?

A. That is only if I work more than eight hours.

Q. Is that what you typically do?

A. Eight hours. I usually work the 9:00 to 5:00 shift on Saturdays. Sometimes they ask me to work an overnight if they have no one else available.

Q. On January 6 you made $170. Did you work overtime?

A. Yes.

Q. On January 18 you made $182. Is that with overtime?

A. Yes.

Q. On January 7 you made $170 so you worked overtime?

A. Yes, I did.

[846]

Q. Out of the last four weeks in January, three of those you worked overtime?

A. It is not overtime; just an extra day I get in. They don't give overtime.

Q. It is straight time?

A. Yes, exactly..

Q. $10 an hour?

A. Yes, sir.

Q. Have you ever worked at St. Vincent's Hospital?

A. I never worked there, no, sir.

Q. You applied for a job there as an EMT specialist?

A. I was going to, yes.

Q. Isn't it true that in 1989 as part of your fire department training, you were trained on chemical safety at Metro-North?

A. Yes.

Q. What does that mean?

A. We were trained on various types of chemicals.

Q. That you could be exposed to?

A. The hazards and how to avoid them.

Q. You also received in 1989 hazardous recognition training as part of your Fire Department duties?

A. Yes.

Q. You also received toxic dust hazard training in 1990?

A. Exactly.

Q. In 1990 you also received toxic particulate hazard training?

A. Exactly.

Q. What does that mean?

A. Just particles of dust, types of dust from different chemicals or different metals.

Q. Toxic means poisonous?

A. Exactly.

Q. These are all things you have learned are part of the risk of being a fireman and you continued to be a fireman?

A. Because I am well protected. They teach you now how to protect yourself.

Q. In October 1991 you received Metro-North chemical safety training about organic solvents?

A. Yes.

Q. That is basically like degreasers and things like that?

A. Degreasers, ammonia, bleach.

Q. Benzene is something Dr. Nicholson said is a big hazard?

A. We do not use benzene at Metro-North.

Q. You received training about organic solvents. I presume they told you they could be hazardous when you are fighting a fire?

[849]

A. And bleach and ammonia is hazardous when fighting fires.

Q. In 1992 you received hazardous material training again?

A. Yes.

Q. In fact, most of your training with this fire brigade has mostly been about chemical safety, toxic dust; isn't that true?

A. Yes, it is.

Q. You have taken several hepatitis vaccines; isn't that right?

A. It is a three-shot series. You are given one a month, and after the second one, after six months, you receive the final one.

Q. Basically, you signed a consent form that states that, "The law requires that hepatitis B vaccine be offered at no expense to those employees whose work may bring them in contact with blood, body fluids or needles contaminated with hepatitis B;" isn't that right?

A. Yes, sir.

Q. That was in connection with your fire department duties?

A. Not only, but everybody in the pipe shop and machine shop, too; anybody who works around open sewers has been offered the shot. It is mandatory.

[850]

Q. It is mandatory that you are offered it. It is not mandatory that you take it?

A. It is mandatory that you are offered it, yes, sir.

Q. In fact, while you keep saying it is mandatory with respect to the pipe shop, the reference that you took the hepatitis B vaccine is on your training record for the fire department; isn't that right?

A. Exactly. We were the first to be offered the shot.

Q. Because you have the highest risk?

A. I guess so, yes.

MR. LANDMAN: I don't have anything further, your Honor. Thank you.

THE COURT: Redirect. Are you ready to proceed?

MR. GOETSCH: Yes, your Honor. We can proceed.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. GOETSCH:

Q. Mr. Buckley, Mr. Landman asked you about a letter from general superintendent, Grand Central Terminal, Palmer?

A. Yes, sir.

Q. That has been marked as Plaintiff's Exhibit 0030.

[851]

Would you take a look at that, Mr. Buckley, and tell us how that letter came about?

A. This was

MR. LANDMAN: Objection; relevance.

THE COURT: You asked him about the letter.

MR. LANDMAN: Because on direct Mr. Goetsch brought out that it said that he was licensed.

That is the only point I asked him about, your Honor.

THE COURT: He has asked about it. He might as well let us know.

THE WITNESS: On November 5, 1987 after we had the training at Envirosafe we were still asked to remove asbestos on, like I said, sometimes on a daily basis, so at one point they were doing renovation work in a room called the kit room down in Grand Central Terminal.

The kit room was going to be turned into a communications center. Down in this kit room there were steam pipes running through it.

We were asked, I should say, told, to go down and cut the pipes out. The pipes were covered with asbestos insulation. I think there was four or five people on the jobs. There were three burners.

I know people used oxygen acetylene torches. When we went down there we saw how much asbestos was involved and we had complained about it.

[852]

So Larry Brown, who was one of the people on the job, said, well, I am going to go up and stop this.

MR. LANDMAN: Objection; hearsay, your Honor.

MR. GOETSCH: Under 801(d)(2)(D) it is not hearsay. He is explaining --

THE COURT: He is trying to explain how the letter came into being. Whether he said it or not, we don't know.

THE WITNESS: So Larry Brown --

THE COURT: We are assuming he said; whether it is true or not, we don't know.

THE WITNESS: Larry Brown was acting as a union representative because of the fact that any member in good standing with Local 149 may represent one or more members of the union. That is an agreement between Metro-North and the sheet metal workers international union.

He said that he was going to write a letter and see if this can finally come to a stop. The letter is here. He wrote to it, wrote a grievance about it to the labor relations department and told Fred Palmer who was the general terminal superintendent.

The next day the letter came back addressed to the union to Mr. Paul Muro who was our local representative of sheet metal workers international. The letter states I will give you a bit -- that it has always been the pipe shop's

THE COURT: Just read the -- you read the letter to the jury.

MR. LANDMAN: Okay.

THE COURT: You are offering it in evidence?

MR. GOETSCH: Yes, your Honor.

MR. LANDMAN: I have no problem with Mr. Palmer's letter coming in. The attachments we can't ask anyone about because that person is not here and he is Mr. Goetsch's former client. We don't have any control --

MR. GOETSCH: The letter to Mr. Palmer is what produced Mr. Palmer's letter, your Honor.

THE COURT: Let me see it. There is nothing attached to that.

MR. GOETSCH: That is what was attached to it, your Honor. That is the letter that Mr. Brown wrote on behalf of himself and the other pipefitters.

MR. LANDMAN: If Mr. Goetsch is going to testify to that effect, because Mr. Brown was Mr. Goetsch's client --

MR. GOETSCH: Not at that time, your Honor, he wasn't.

THE COURT: Read it.

MR. GOETSCH: Ladies and gentlemen, this is a letter dated November 5, 1987 to Paul Muro, local

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representative of the sheet metal workers at Grand Central. It is from the general superintendent, F.T. Palmer.

"Dear Sir: This is in response to the grievance submitted on behalf of Mr. Larry Brown dated November 4, 1987. It is your contention that the removal of existing pipe insulation is not covered under the scope of the controlling agreement.

"Additionally, Mr. Brown indicated that Mr. Macaluso advised him that if he refused a direct order he would be taken out of service for insubordination.

"Please be advised that we do not agree with your position. Based on past practice, the pipefitters at Grand

Central Terminal have always handled the removal and replacement of all pipe insulation.

"Furthermore, Mr. Macaluso's statement was not intended to intimidate Mr. Brown; it was merely intended to inform him of the seriousness of refusing a direct order. Therefore, based on the fact that Mr. Brown suffered no loss of earnings, nor was he reprimanded in any fashion, it is our contention that there is no basis for this grievance. Very truly yours, general Superintendent Palmer." That was dated November 5, 1987.

THE COURT: I take it the jury understands the word "grievance" means as a union representative they ask

[855]

that certain things be done and --

MR. GOETSCH: I offer that as a full exhibit, your Honor.

MR. LANDMAN: No objection.

THE COURT: Received. (Plaintiff's Exhibit 30 for identification was received in evidence)

Q. Mr. Buckley, what does it mean to be taken out of service for insubordination at Metro-North?

A. In a case --

MR. LANDMAN: Objection.

THE COURT: Sustained.

Q. Mr. Buckley, do you ever smoke cigarettes in your house?

A. No, sir.

Q. You were asked questions about asking your foreman and superintendent whether the insulation was actually asbestos?

A. Yes.

Q. What did they indicate to you prior to August of 1987?

A. That it was not asbestos.

Q. Did you also speak to the safety department regarding that?

A. Yes, we did.

[856]

Q. Did they indicate to you -- what did they indicate to you?

A. That it was not asbestos.

Q. Has any of the pipefitters who worked along with you in Grand Central from 1985 up to the present during

the last ten years developed any asbestos-related diseases as of this point in time as far as you know?

A. Not that I know of, no, sir.

Q. You were asked questions about smoking, Mr. Buckley. As far as your risk from your asbestos exposure is concerned, do you blame Metro-North for any additional or increased --

THE COURT: He said he didn't on direct.

Q. You were asked about seeing an attorney McCarthy. Did you ask attorney McCarthy to retain you?

A. No.

Q. Did you ask Mr. McCarthy to represent you?

A. No.

Q. Subsequent to seeing him, did you contact my firm?

A. Meaning after?

Q. Afterwards, yes.

A. After, yes.

Q. At that respirator class in February of 1987, Mr. Buckley, did anything occur during that class to give

[857]

you reason to use any respirator while removing pipe insulation between February of '87 and up through August of '87?

A. Yes.

Q. What was that?

A. The training film we watched.

Q. You are referring to the training film that you saw in August of 1987?

A. Yes.

Q. The question was, prior to that, did anybody give you any reason to use a respirator when removing pipe insulation?

A. No, sir.

Q. All told, during the calendar year 1987, how many days did you not work at Metro-North for whatever reason?

A. I don't know offhand, sir.

Q. Can you give us a number of weeks for vacation, personal time, anything?

A. I know I have two weeks vacation time and we get no personal time. Your normal holidays and days off, I couldn't tell you how many in 1987.

Q. Is it your testimony that you were not fit tested at the August 1987 class for a respirator?

A. Yes.

Q. In January of 1990 did the Metro-North medical

[858]

department at Grand Central actually give you copies of your x-rays?

A. No. They did not have them. Like I said, they were at the laboratory that took the x-rays.

Q. Mr. Buckley, why did you become a volunteer fireman on Metro-North?

A. I like helping people out.

Q. Has there been any time during your work as a fireman at Metro-North when you have not been properly protected as a fireman?

A. No, sir.

Q. What type of protection do you have as a Metro-North fireman at Grand Central?

A. We have bunker pants, we have overcoats, fire overcoats, we have helmets, full face masks with an air pack on the back that holds 20 minutes of air.

Q. Did your training regarding hazardous materials in connection with your fire brigade work at Metro-North, did that occur after 1988?

A. Yes.

MR. GOETSCH: No further questions at this time, your Honor.

MR. LANDMAN: No questions, your Honor.

THE COURT: Okay. You may step down. Next witness.

SELECTED EXHIBITS ADMITTED INTO EVIDENCE DURING TRIAL

PLAINTIFF'S EXHIBIT 0001

(Title omitted in printing)

ADMITTED AND STIPULATED FACTS

1. The defendant, Metro-North Commuter Railroad, is a railroad corporation duly established by law, and having a usual place of business in New York, New York.

2. The plaintiff Michael Buckley is of Belle Harbor, New York, and is employed by the defendant Railroad as a pipefitter.

3. The defendant Metro-North Commuter Railroad is a common carrier engaged in the business of interstate commerce, and as such, operated a railroad in such business between New York, New York, and New Haven, Connecticut.

4. From 1985 to the present, the defendant Railroad was engaged in interstate commerce and the plaintiff was employed in furtherance of said commerce.

5. From 1985 and extending up to the present, the plaintiff Michael Buckley has been engaged in his duties as an employee at or about Grand Central Terminal, New York, New York, which yards, buildings, tunnels, pipes, wires, rooms, ceilings, walls, service plant, and all other facilities and structures appurtenant thereto were operated and/or maintained by the defendant Railroad.

6. By no later than 1986 the defendant Railroad obtained actual notice of the presence of asbestos in Grand Central Terminal and notice of the hazard that working with or around asbestos posed to the health and welfare of its employees.

7. Metro-North admits that it negligently exposed the plaintiff Michael Buckley to asbestos while he was working in Grand Central Terminal from June 1985 to the beginning of September 1987. During that time period Metro-North admits that it exposed the plaintiff to asbestos without warning him that he was being exposed to asbestos and without training him how to safely handle and remove asbestos.

8. According to the U.S. National Center for Health Statistics, Vital Statistics of the U.S., Annual, the life expectancy of a white male person 39 years of age is 36.5 years.

PLAINTIFF'S EXHIBIT 2051

ABATEMENT SAFETY
TRAINING INSTITUTE
323 West 39th Street
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OSHA AWARENESS

MANUAL

STUDENT GUIDE

TAPE 1: ASBESTOS AND ITS HEALTH EFFECTS

OBJECTIVE

Upon completion of this section, you will be able to demonstrate a general knowledge of the history, uses, and characteristics of asbestos. In addition, you will gain a basic understanding of the terminology associated with asbestos work. You will also understand the potential hazards and health effects of asbestos exposure.

HISTORY OF ASBESTOS USE

Asbestos has been used since the beginning of recorded history in everything from pottery and bricks to embalming sacks. The first connection between asbestos exposure and health problems was discovered in approximately 100 A.D. By the early 1900's there was fairly conclusive evidence of significant lung damage from asbestos exposure. In 1918, Prudential Life Insurance Company refused to insure North American workers who worked in asbestos mining and

manufacturing occupations. It was confirmed in 1935 that asbestos exposure is a cause of lung cancer. By 1946 it was known that the only cause of mesothelioma was asbestos exposure and that the disease is always fatal.

A direct connection between smoking and increased health risks was identified in 1968. The risk of developing lung disease due to asbestos exposure increases by 50%- 90% depending on the number of packs smoked per day. An asbestos worker who smokes one pack a day has a 50% risk increase.

The first OSHA standard for permissible exposure levels (PEL) for asbestos was set in 1971 at 12 fibers per cubic centimeter based upon an 8 hour time weighted average (TWA). The present PEL standard is set at 0.2 fibers per cc. Short term, high exposure excursion limits are set at 1.0 f/cc measured over one-half hour.

TYPES OF ASBESTOS

Asbestos is a natural mineral and is found in rock formations. When the asbestos is separated from the rock it becomes a fluffy, fibrous material. There are several different types of asbestos. Serpentine is characterized by long flexible fibers which easily sticks to other surfaces. Chrysotile is the most commonly found type of asbestos and amphiboles resists water. Other types of asbestos include amosite, crocidolite, anthophyllite, actinolite and tremolite.

USES FOR ASBESTOS

There are over 3,000 products manufactured which contain asbestos. The major user of asbestos products is the construction industry. The automotive and textile industries have also used asbestos containing materials because of its strength

and unique characteristics. Asbestos has also been used in building materials, insulation and fire prevention products and materials for sound absorption and filtering.

ASBESTOS CLASSIFICATION

Asbestos can be classified into two categories: hazardous and non-hazardous. Asbestos is considered hazardous when it is in a deteriorating condition. This category of asbestos is also considered to be friable. Friable means that it can be easily crumbled from hand pressure to create tiny airborne fibers. In addition, improperly disposed of asbestos waste is considered hazardous.

Non-hazardous asbestos is firmly bonded and non-friable. Asbestos containing material which has been encapsulated is considered non-hazardous.

WHEN ASBESTOS CREATES HEALTH EFFECTS

All asbestos containing materials (ACM) are potentially hazardous. Although firmly bonded and non-friable ACM is considered non-hazardous, it can become hazardous if it is sanded, drilled or sawed which releases asbestos fibers into the air. Renovation or removal activities present the greatest likelihood of generating hazardous conditions. For that reason, special precautions must be taken when working with friable asbestos containing materials.

HEALTH EFFECTS OF ASBESTOS EXPOSURE

Health risks are created when asbestos fibers are inhaled or ingested. Breathing air which contains asbestos fibers and ingestion of fibers from food or drinks which have been exposed to asbestos fibers causes health-hazards.

Fibers accumulate in the lungs and can be carried to other parts of the body through the bloodstream or lymphatic system. Asbestos fibers have very harmful characteristics. The fibers are very sharp, virtually indestructible and can penetrate the tissues and remain there for a long time.

Asbestos hazards are increased by the intensity of the asbestos dust, fiber size, and specific type of asbestos. In addition, individual susceptibility, smoking and presence of other pollutants can increase the health hazards associated with asbestos exposure.

EXPOSURE LEVELS

Asbestos exposure that a worker may be exposed to is stated in terms of the number of fibers per cubic centimeter calculated as an eight hour time weighted average (TWA). A cubic centimeter is like a box with sides of about a half inch.

The Permissible Exposure Level (PEL) is 0.2 f/cc for an 8 hour TWA. This is the level above which you must wear a respirator and protective clothing.

The Action Level is one-half the permissible exposure level or 0.1 f/cc 8 hours TWA. Medical surveillance is required if a worker is exposed at or above the action level for 30 or more days per year.

EFFECTS OF ASBESTOS ON THE BODY

Asbestos which is inhaled or ingested can produce serious health effects. For example, air passes through the mouth and the nose into the windpipe or the trachea. The lungs put oxygen into and remove waste products from the blood in the alveoli. Inhaled asbestos particles enter the lungs and

become lodged in either the alveoli or in the pleural lining. As a result, the lung's natural process for cleaning themselves becomes damaged and the asbestos fibers remain in the lungs. When the linings of the lungs become damaged, inhalation cannot occur properly. With damage, the walls thicken and oxygen from the air is not property diffused to the blood and not properly removed from the blood into the air.

When airborne asbestos fibers are inhaled, a fraction of the fibers may be deposited in the lungs. The accumulation depends on, among other things, the size of the fibers. If this exposure continues over time, large quantities of fibers can accumulate on the linings of the lungs and in other parts of the lung tissue. This accumulation of asbestos fibers can lead to various changes in the lungs, primarily to fibrosis or scar formation which interferes with normal lung functions.

Smoking increases the risk of working with asbestos because smoke deadens some of the body's natural defenses and contains ingredients which can injure lung cells thus making the lungs more susceptible to specific lung injuries. Smoking also causes a series of reactions resulting in the attraction of other inflammatory cells to the lungs.

ASBESTOS RELATED DISEASES

The cumulative abrasive action of asbestos fibers in the lungs over time makes the lungs less flexible and less efficient. This condition results in the disease called asbestosis. All forms of asbestos can cause this disease. Asbestosis has a latency period of 20 to 40 years after exposure. The main symptom of asbestosis is shortness of breath which progressively becomes more severe. Other symptoms include a dry cough, rattles in the lungs, chest tightness and pleural effusions. Asbestosis may show no symptoms even though it is present.

Early diagnosis of asbestosis is possible using chest x-rays. The initial onset of asbestosis is not always life threatening. In advanced stages it becomes totally incapacitating because the lungs cannot function properly. The disease is irreversible and can progress even after the person is removed from exposure situations. There is no available treatment for asbestosis.

Mesothelioma is a cancer of the lining around the lungs or the lining of the abdominal cavity or the lining of the cavity which holds the heart. Exposure to asbestos fibers is the only known cause of this disease. Mesothelioma is caused by a smaller dose of asbestos exposure than other asbestos related diseases and is not affected by smoking. Mesothelioma is only contracted by asbestos workers. In addition, family members can contract the disease from fibers brought home by the worker who did not follow proper decontamination procedures. Mesothelioma has a latency period of 20 to 40 years after exposure. The symptoms include shortness of breath and chest pain. Diagnostic tests include x-rays to identity areas of pleural thickening as well as tissue examinations. There are no effective treatments for mesothelioma and death usually occurs within two years after the onset of the symptoms.

Lung cancer is also caused by asbestos, but it can be treated if detected early. Asbestos workers who smoke have five to nine times the risk for contracting lung cancer that asbestos workers who do not smoke. Lung cancer has a latency period of 20 to 30 years. The lower the exposure, the longer it takes for the disease to develop. The symptoms of lung cancer include a cough or change in coughing habits, chest pain which is not related to coughing and blood streaked saliva. The diagnostic procedures involve regular screening, chest x-rays and pulmonary function testing and pap smears of sputum. Final diagnosis must be confirmed by a biopsy.

The death rate for lung cancer is very high unless the disease is detected and treated early. Treatment includes surgery, drugs, radiation or a combination. Asbestos exposure can also cause cancers of the stomach, esophagus, colon, pancreas. In addition, pleural plaques, pleural effusion and pleural thickening may result from exposure to asbestos containing materials.

PROTECTION AGAINST EXPOSURE

There are a number of ways that you can protect yourself against asbestos exposure. It is very important to follow good engineering controls and use respiratory protection, wear protective clothing, properly dispose of asbestos, conduct air monitoring, have regular medical examinations and stop smoking.

Spouses and children of long term asbestos workers have a higher than normal incidence of asbestosis, lung cancer and mesothelioma than the general population. Special care should be taken to properly decontaminate yourself before leaving the work site.

All employees who will be working with asbestos must be given a free physical examination within thirty days of employment and another exam thirty days after termination. The physician must sign a form indicating that the worker is fit for asbestos work and can safely wear a respirator.

PLAINTIFF'S EXHIBIT 4010

STATE OF NEW YORK
METROPOLITAN TRANSPORTATION AUTHORITY
OFFICE OF THE INSPECTOR GENERAL
JOHN S. PRITCHARD III
Inspector General

STATE OF NEW YORK
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ROBERT ABRAMS
Attorney General

Report on Metro-North Commuter Railroad's Handling of Asbestos in Grand Central Terminal

MTA/IG 89-20
September 19, 1989

Introduction

In late 1986 and early 1987, employees of the Metro-North Commuter Railroad (Metro-North) assigned to Grand Central Terminal complained to management about their exposure to asbestos in the workplace. When management took on actin to abate the asbestos and continued to direct the employees to work in unsafe conditions, the workers contacted the Office of the New York State Attorney General. That office contacted the Office of the Metropolitan Transportation Authority Inspector General and the Joint investigation was begun.

The investigation focused on Metro-North's response to the asbestos problems brought to its attention both by its employees and, concomitantly, by an outside consultant

which examined these problems in connection with the planned renovation of the Terminal. We also examined apparent abuses in the contracting process pertaining to abatement work and claims that management retaliated against the workers who had brought the asbestos problems to both its attention and that of outside agencies.

Our detailed findings and recommendations follow. The Appendix discusses relevant asbestos laws and regulations.

Findings

[Redacted]

- Metro-North has no asbestos abatement program covering all of Grand Central Terminal, and has not followed recommendations made by an outside consultant to abate asbestos conditions dangerous to its workforce. Asbestos is abated only incidental to routine maintenance or in connection with Terminal modernization conducted by the Capital Program Division.

- Extensive asbestos contamination has been confined to non-public areas of Terminal. However, small lengths of insulation in certain public areas identified by Metro-North's outside consultant should be inspected and, if found to contain asbestos, either removed or better encapsulated.

- Metro-North has been improperly using emergency contracting procedures in the abatement area since 1987 because it has made no effort to assess the impact of planned, routine maintenance work on existing asbestos. Thus, when such work cannot

proceed safely because it would disturb asbestos, Metro-North simply calls in an asbestos abatement consultant, Envirosafe, Inc., to remove the asbestos on an "emergency basis." This delays planned maintenance and is expensive as well.

- Metro-North has failed to develop an oversight program to ensure that workers are provided with safety equipment and that the equipment is in fact used. Management has also failed to implement a safety equipment maintenance program and to provide a laundry facility.

[Redacted]

- Metro-North has inadequate staff in its Safety Department to deal with safety and health matters concerning toxic materials. Currently only one person is responsible for all safety and health measures regarding toxics, including asbestos and PCBs, throughout the system.

- Metro-North failed to implement in a timely manner worker education and training programs concerning all toxic chemicals, including asbestos, in violation of the State "Right to Know" law.

[Redacted]

Recommendation

We recommend that Metro-North implement the following with respect to asbestos at the Terminal:

1. Metro-North must comply with all applicable New York State regulations pertaining to asbestos.

2. Metro-North must systematically evaluate the asbestos-related problems involved in planned maintenance to be done in Grand Central Terminal. It should also implement the recommendations made by an outside consultant in 1986 with respect to asbestos abatement. As appropriate, non-emergency contracts should be let to address the problems.

3. The Safety Department should be assigned responsibility for all asbestos-related matters, including the reporting of problems, overseeing of abatement work, and formal contract management. Additional Safety staff is needed to insure that the increased responsibility in the Safety Department is addressed. Employment of a full-time asbestos specialist is recommended.

4. Metro-North must abate a larger area around pipe-valves which require maintenance.

5. Laundry facilities should be made available to all workers who may be exposed to asbestos fibers to insure that those fibers are not carried outside the workplace. The facilities should be the sole responsibility of Metro-North and not, as is presently the case, that of the individual workers.

6. All supervisory personnel assigned to the Terminal should be trained to identify asbestos and to prepare them to oversee private contractors' work to insure proper abatement.

7. Management, when making personnel decisions which may reasonably be expected to lead to complaints of retaliation, should keep written, dated records of the history and rationale of such decisions.

Investigation

Grand Central Terminal is a major center for Metro-North's operations. From 1913, when the Terminal was constructed, and through the mid 1970's, asbestos was considered to be one of the best insulating materials available. It was used throughout the Terminal to insulate walls, pipes, and wires. Much of it remains today. By the mid 1970's, however, asbestos had been widely recognized as highly carcinogenic, and legal limits on worker exposure to it were imposed.

Around September 1986, several events transpired which brought to management's attention the problems with asbestos at the Terminal and the necessity for prompt action to deal with these problems. These were a fire at the Terminal, which resulted in citations for asbestos-related violations, worker complaints to management, and the release of a consultant's report pertaining to the infrastructure of the Terminal. Despite being placed on notice about these problems, management took no action for almost one year, a failure which it has never satisfactorily explained.

September 1986 Fire

The fire, which received much public attention, caused extensive damage to the track area of the lower level of the Terminal. Metro-North employees complained to the New York State Department of Labor (DOL) about working conditions in the fire areas.

In response, DOL conducted two inspections, on October 2nd and 15th, 1986, and cited Metro-North for seven asbestos-related violations. These violations were for:

- Failure to accurately monitor the airborne concentrations of asbestos.
- Failure to properly collect and dispose of asbestos.
- Failure to demarcate asbestos work areas to minimize the number of persons within the area and protect others from exposure.
- Failure to limit access to asbestos removal areas to authorized persons.
- Failure to provide warning signs demarcating regulated areas.
- Failure to deal properly with protective clothing.
- Failure to insure that asbestos waste did not accumulate on the floor or fall to the floor.

At that time, Metro-North simply had no policies or procedures regarding the handling of, or public or worker exposure to, asbestos.

Worker Complaints

Besides alerting the DOL, Metro-North employees brought their concerns to the attention of management. Metro-North employees had become more knowledgeable about the hazards involved in exposure to asbestos, due largely to the efforts of the White Lung Association, a victims advocacy group, which the employees had independently contacted.

The employees directed management's attention to the working conditions to which they were subject in the steam

tunnels and Service Plant area and to the health hazards involved. Many of them refused to remove and dispose of asbestos as they were ordered to by management. In addition, their requests for information on asbestos exposure were almost totally ignored. At that time, Metro-North had no "Right to Know" program in place, as required by State law,* to inform workers about hazardous conditions.

In early 1987, Metro-North's Director of Safety personally inspected these areas and observed that insulation around pipes in the Service Plant had torn open and that asbestos was falling to the ground. He observed similar conditions in the steam tunnels.

The Metro-North Safety Department admitted to us that employees did, in fact, bring these matters to its attention in September 1986. However, the minimal actions taken by Metro-North thereafter to correct these problems proved ineffective, and employees continued to work and continued to remove and dispose of asbestos.

In connection with pipe repair work, pipe shop workers were directed to remove asbestos material by simply cutting it away from pipes. These workers referred to themselves as "snowmen" as they were covered with white asbestos powder when they returned from the tunnels where the pipes were located. In addition, their asbestos-coated clothing and boots were worn home, likely exposing their families to the white asbestos powder.

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* See Labor Law §§ 875 *et seq.* A training program is now in place, albeit years late. The program was begun in January 1989 and approximately 50% of Terminal workers have been trained to date.

[Redacted]

1986 Outside Consultant's Report

Also in September 1986, Metro-North management received a consultant's report evaluating the infrastructure of the Terminal. This report, prepared by the firm of Syska and Hennesey, an engineering consulting group, was part of the preparation for the rehabilitation of the Terminal and included a survey to determine the amount of asbestos still in use throughout the Terminal, its condition, and an estimate of abatement costs.

Syska and Hennesey, through a subcontractor, Environmental Health Protection Consulting, Inc., recommended priorities for asbestos abatement. Their priority ranking was based upon factors including potential health risks, whether a given location was designated for capital rehabilitation and the extent of public access to the affected area.

Very little of the insulation in public areas of the Terminal was found to be composed of asbestos containing materials. However, some small amounts of insulation appeared to be damaged, and if containing asbestos, could pose a threat of exposure to the public. While inspection and either removal or repair was not given a high priority by the consultants, it does not appear that these limited potential problem areas have been addressed by Metro-North.

The steam tunnels and Service Plant, the areas of most concern to the employees, were not ranked as top priority areas in the consultant's report because they were not scheduled for rehabilitation and were not accessible to the general public. Nevertheless, the report noted that the Service Plant contained exposed and friable (dried out and crumbling) asbestos insulation covering pipes and elbow

joints, and recommended "quick action" to deal with continued employee exposure.

Specifically, the report stated in regard to the Service Plant:

> . . . . numerous pipes and elbows have exposed friable areas that pose a *significant potential contamination hazard for the workers in this area* . . . . A program must be established to - at a minimum - repair the damaged sections of insulation with a long term project to remove the (asbestos containing material) altogether. *The fact that workers are exposed to these materials daily warrants quick action to minimize exposure and insure that the workers health is not endangered.* (Emphasis added).

Thus, despite being placed on notice of dangerous asbestos conditions in the Terminal by worker complaints, DOL inspections and its own consultant's report, Metro-North took no action to correct the problems in the Service Plant until the summer of 1987.

No plan for abatement was created. Employees continued to work with asbestos crumbling from pipes and walls and falling down on them and accumulating on the floor around them. They were still directed to remove asbestos and dispose of it as regular waste.

Indeed, Metro-North even failed to correct the violations found by DOL. The DOL, following up on its finding of violations in October 1986, returned again on May 22nd and June 12th, 1987 for compliance checks to determine if the asbestos violations had been corrected. According to the

DOL, the violations remained uncorrected and the workers continued to face the uncorrected conditions. Metro-North responded by claiming that the violations had in fact been corrected and what the DOL found were new violations. However, Metro-North had no documentation to support its claim and the DOL insisted that its findings were, in fact, correct.

Subsequent to September 1986, numerous confrontations occurred between employees and Metro-North management, as the employees continued to press their claims that they were being subjected to a significant health risk on a daily basis. As a result, in June 1987, Metro-North reached an understanding with Envirosafe Inc., to carry out emergency asbestos removal work although no formal contract was signed.

[Redacted]

Abatement Work by Envirosafe

In the summer of 1987, Envirosafe began to correct the asbestos problems existing in the Service Plant. However, the President of Envirosafe told us that Metro-North management was only interested in what he characterized as a short term, cheap approach to the problem. As a result, Envirosafe, rather than removing or encapsulating the flaking asbestos, wrapped the pipes with tape, and warned Metro-North Operations and Safety personnel that the tape would melt when the steam was turned on. This is precisely what occurred in the fall of 1987. As a result, asbestos fibers were again released into the air.

Metro-North defended its decision to use a short term, inexpensive approach because of its future plans to modernize the Service Plant. However, Metro-North management

admitted to us that such modernization is "years away," extending well into the 1990's.

After months of workers' complaints, Envirosafe returned in February 1988 and permanently encapsulated the insulation on those pipes where the duct tape had failed. However, as recently as January 1989, our staff observed duct tape falling from other pipes in the Service Plant. It is clear that Metro-North has simply failed to secure the effective abatement of all damaged insulation in the Service Plant.

When Envirosafe abates asbestos in connection with routine pipe valve maintenance in the steam tunnels, it does so only in the immediate area of the valve, as requested by Metro-North. When the pipe workers subsequently perform their maintenance duties, they frequently collide with nearby unabated pipes, thereby disturbing asbestos.

the pipe workers to this day leave the steam tunnels with asbestos powder on their clothes and bodies.

The only solution to this problem is for Metro-North to require Envirosafe to abate a larger area around the valve requiring maintenance.

Other Contracting Problems

Metro-North does not have trained personnel who can evaluate abatement contractors' work to ensure it is being done properly. The Safety Department has recommended that Operations staff at or above the level of Supervisor be trained to recognize both hazardous asbestos conditions and improper removal techniques. Supervisory asbestos training. which differs from training of asbestos handlers, is available. While handler training may be useful, Safety does not believe

it is necessary for a supervisor. Since our investigation began, Operations personnel at or above the supervisor level have begun to be trained. However, there is no coordination between Safety and Operations on this issue and in fact the Safety Department has not been informed who has been or is being trained.

An attempt was made by the Terminal General Superintendent, in September 1987, to secure a contract for an on-call contractor to handle emergency abatement work in the Terminal. Contracts Administration was assigned in November 1987 to develop a procurement plan. After reviewing the Superintendent's requisition, it requested either a scope of work or specifications from him. However, in insisting that all abatement work was of an "emergency" nature, the Superintendent said he would need a "crystal ball" to develop a scope of work. In January 1988, he finally agreed to draft specifications. However, he never did so and instead he requested that Contracts examine the New York City Transit Authority's (TA) abatement program. Contracts obtained the TA proposal but, Contracts informed us, without the appropriate specifications from the Superintendent, it was unable to proceed. The Superintendent initiated no further contact with Contracts until March 17, 1988, one day after we raised questions about contracting procedures. Subsequently, the TA proposal was circulated.

The Superintendent claims, erroneously, that the current Capital Programs contract with Princeton Testing Service, which does asbestos assessment work, is a cumulation of his work in this area. In fact the Princeton contract deals solely with the assessment of asbestos related to Capital Programs and does not require Princeton to do any abatement work.

[Redacted]

Conclusion

Our investigation has disclosed that Metro-North has seriously disregarded the health and safety of its workers.

Metro-North's failings are particularly egregious for it was placed on notice of asbestos problems through complaints by its workers, inspections by DOL and its own consultant's report. We also found problems in the contracting process related to asbestos. Finally, we found that certain personnel decisions provided the appearance of retaliation for lawful, protected worker activity pertaining to asbestos problems.

Metro-North's adoption of the recommendations made in this report will enable it to correct these problems.

PLAINTIFF'S EXHIBIT 2403

EHPC

Environmental Health Protection Consultants, Inc.

REPORT ON ASBESTOS ABATEMENT STUDY OF GRAND CENTRAL TERMINAL

2/19/86
to
4/29/86

3.1 UTILITY LEVEL

The majority of the asbestos containing material ("AC") found in GCT is located on this level. The areas studied included the steam tunnel system, kit room and associated spaces (located on the south end of the analysis of 180 separate bulk samples indicates that the vast majority of the insulation in these areas contains asbestos - as Amosite, Chrysolite and Crocidolite - in percentages from 2 to 30 percent).

3.1.3 STEAM TUNNEL SYSTEM

As mentioned the majority of the asbestos-containing insulation in GCT is found in the network of tunnels running from 43rd street to 48th street under the Suburban Platforms. With the exception of the 45th Street Trucking Subway, most of these areas are unoccupied. The original function of these tunnels was to supply steam for use in heating railway cars. The following areas were specifically studied in detail:

- 43rd Street Trucking Subway (Burma Road)
- 45th Street Trucking Subway

- 48th Street Steam Tunnel
- West Steam Tunnel
- East Steam Tunnel (running under Track 100)

The bulk of the ACM in these areas is used to cover 16" high pressure steam lines. In most of the tunnels three to six of these pipes run for distances of 200 to 300 linear feet. The percentage of asbestos (primarily Chrysotile) found in samples taken from these areas range from 10 to 15%. The insulation is generally one to three inches thick, and is reinforced with "wire lathe"; which will add to the difficulty of removal. Generally, the straight runs of these pipes have insulation which is intact. Areas where the pipes bend into new tunnels are the primary sites of damage (one such area is located at the junction of the 43rd street and West tunnels).

With the exception of the East Tunnel, access for the removal of insulation in most of the tunnels is good (Access Factor 1.0 with the East tunnel being 1.5). The low ceiling and closeness of the pipes in the East tunnel would create difficulties in removal. In addition, many of the 16" pipes are active, and removal work would pose a burn hazard and create a hot environment that may result in heat stress problems for any removal workers. (Additionally, the tunnels are often occupied by "street people" that make the establishment of secure removal containments difficult.) The quantity of material to be removed right also present a unique problem in the logistics of waste transport.

Because of the amount of ACM and the limited access to the steam tunnels, it is advisable that these areas be a low priority. If a removal is anticipated, the 45th street tunnel would be a good candidate this area is good. As for the other areas, it is recommended that a long-term, phased removal or encapsulation - strategy be considered.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 13, 1995

MICHAEL BUCKLEY, Plaintiff,

v.

METRO-NORTH COMMUTER RAILROAD, Defendant.

No. 89 Civ. 7170-A(WK).

United States District Court,

S.D. New York

March 13, 1995.

WHITMAN KNAPP, Senior District Judge.

This is a case brought under the Federal Employers Liability Act ("FELA") by one of the "snowmen of Grand Central Terminal" for negligent infliction of emotional distress caused by defendant Metro-North's negligent exposure of plaintiff to asbestos from June of 1985 to early September, 1987. Because defendant had conceded negligence, the only issues at trial were causation and damage. At the close of plaintiff's case, defendant moved for a directed verdict. Because we find that plaintiff failed to prove that he had sufficient impact with asbestos to result in a reasonable fear of developing an asbestos-related disease; and because he failed to prove that he had suffered a real emotional injury, we grant defendant's motion and direct a verdict in its favor.

Statement of the Facts

Drawing all reasonable inferences in plaintiff's favor, the relevant facts are as follows: Plaintiff Michael Buckley is a 39-year-old pipefitter who has worked for Metro-North at Grand Central Terminal since 1985. When Buckley was first hired as a pipefitter, Metro-North ordered him to work in the network of steam tunnels that run beneath Grand Central Terminal. There are miles and miles of pipes in those tunnels, covered with white insulation.

As a pipefitter, Buckley was assigned to repair and maintain these pipes. To do so, Buckley would have to remove the old white insulation from the pipe he was working on. He would take whatever tools he had available--a hammer, axe, wire shears--and pound the insulation away from the area where he had to work. As he did so, the insulation would break apart and fall to the floor. Buckley would kick it aside to get it out of his way, releasing clouds of white insulation dust into the air. He would become covered with this dust--it would get into his hair, his face, his mouth, his nose, his clothes. He would come up from the steam tunnels literally covered from head to toe with white insulation dust. Thus the nickname "snowman of Grand Central."

Most of this white insulation dust was asbestos, a known cancer-causing substance. Over a three-year period, from June of 1985 to June of 1988, Buckley worked on average for one hour a day actually removing and handling this insulation. Metro-North admits that it knew asbestos was present in Grand Central Terminal and that it knew of the hazard that working with and around asbestos posed to the health of its employees. It admits that it negligently exposed plaintiff to asbestos from June 1985 until early September of 1987. Metro-North admits that during this period it did not

warn plaintiff that he was being exposed to asbestos, nor did it provide training for him on how safely to handle asbestos.

On August 31, 1987, Metro-North sent Buckley and his co-workers to an all-day asbestos awareness class. There, Buckley was told that the insulation he had been working with was asbestos, and that asbestos exposure causes painfully deadly diseases such as lung cancer, mesothelioma and asbestosis. At that class, Buckley was shown how to remove asbestos insulation, and was given a half-face respirator that was not fit-tested. He was also shown two videotapes: one of men lying in hospital beds gasping painfully for air as they slowly died from asbestos disease; and another that indicated that smoking contributed to the risk of developing lung cancer, and that smokers who work with asbestos could cut their risk of developing cancer by a significant amount if they quit smoking. Buckley has a history of smoking about a pack a day since he was seventeen. In 1991, Buckley cut down to an average of one cigarette a day, which is what he now smokes.

Subsequent to learning about his exposure to and the dangers of asbestos, Buckley contacted the law firm of Cahill, Goetsch and DiPersia, which he retained to represent him in this law suit. In 1990 and again in 1994, one of the lawyers sent him to the Mount Sinai Occupational and Environmental Health Clinic. There, he was examined by Dr. Steven Markowitz, who gave expert testimony that as a result of Buckley's exposure to asbestos, he has a 1 to 3 percent increased risk of dying from asbestos-related cancer, and a 10 percent increased risk of developing scarring of the lining of the lungs. He further testified that it takes 20 to 40 years for clinical signs of asbestos disease to develop, and that Buckley currently showed no physical signs of asbestos exposure. He recommended that Buckley continue to be medically monitored for future signs of asbestos-related

disease. Another professor from Mount Sinai, Dr. William Nicholson, also examined Buckley and testified that Buckley's risk of dying from cancer as a result of his asbestos exposure has been increased by between 1 and 5 percent.

Buckley brought this law suit seeking the cost of his past and future medical monitoring expenses and for negligently inflicted emotional distress, consisting of loss of peace of mind, anxiety, fear of the future, anger, worry and distress due to his increased risk of dying from cancer.

Physical Impact

Taking all the facts plaintiff alleged as true, there is not sufficient evidence to allow a jury to find that plaintiff has had the requisite physical impact or fear of physical impact to warrant a finding of negligent infliction of emotional distress. On this question, there is no categorical authority. Rather, there are a number of guideposts. The most recent and authoritative of these is the Supreme Court's July, 1994 opinion, *Consolidated Rail Corporation v. Gottshall* 114 S.Ct. 2396, in which the Court established that negligent infliction of emotional distress is an action cognizable under the Federal Employers' Liability Act ("FELA"). In so holding, however, the Court indicated its concern that "recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants." *Id.* at 2405.

To avoid such a result, the Court placed "substantial limitations on the class of plaintiffs that may recover for emotional injuries, and on the injuries that may be compensable." *Id.* at 2405. The Court indicated that one such limitation would be the common law "zone of danger" test:

> Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries--physical and emotional--caused by negligent conduct of their employers that threatens them imminently with physical impact."

Id. at 2410.

The Second Circuit followed *Gottshall* in *Marchica v. Long Island Railroad Co.* (2d. Cir. 1994) 31 F.3d 1197. In that case, the court found that a railroad employee whose finger had been penetrated by a needle and subsequently suffered a fear of contracting the AIDS virus could recover on a claim of negligent infliction of emotional distress. In so holding, the court reasoned that plaintiff had met the *Gottshall* "zone of danger" test because plaintiff had actually suffered a physical injury: a hypodermic needle had penetrated his body. The court went on to note, however, that "had Marchica merely touched the discarded needle and become concerned about the possibility of developing AIDS, the case would stand on a very different footing." *Id.* at 1204.

Clearly, the Second Circuit was mindful of the Supreme Court's concern of creating infinite liability for defendants. Much of the opinion focuses on various means of assessing the genuineness of a claim for negligent infliction of emotional distress absent a physical injury. In such a case, where no physical injury has occurred, the court suggested that proof of exposure to a contaminated substance was a "substitute means for providing a guarantee of the merits of a plaintiff's claim." *Id.* at 1204. Only with such evidence of

exposure can plaintiff show that fear of developing a disease related to the contaminated substance is reasonable. Relying on other "fear-of-developing-disease" cases, the court adopts the proposition that "the exposure requirement--plus actual likelihood of developing the disease-- ... is a means of ensuring the genuineness of the claim." *Id.* at 1205. *See also Doner v. Admans Contracting Inc.* (A.D. 3 Dep't. 1994) 617 N.Y.S.2d 565, 566 ("Mental anxiety occasioned by the fear of developing a disease is not considered reasonable unless there is, at the very least, some evidence substantiating both actual exposure to the disease-causing agent ... and a likelihood of contracting the disease as a result").

The case at bar, like that envisioned by the *Marchica* court, is "on very different footing." Here, there was no physical injury analogous to being pricked by a hypodermic needle. Therefore, we must consider the Second Circuit's other means of assessing the genuineness of plaintiff's claim: whether plaintiff can show proof of exposure to asbestos such that there was a sufficient likelihood of contracting a disease to make plaintiff's fear reasonable. On the present record, he has made no such showing.

There is plenty of evidence in this case that plaintiff was around asbestos, even touched by asbestos. But there is no proof, assuming that he had occasionally inhaled asbestos, that he inhaled enough to create a reasonable fear of developing an asbestos-related disease.** Plaintiff's own expert, Dr. Nicholson indicated that determining an individual's actual exposure to asbestos is "fraught with difficulties because it depends upon individual sensitivity and the

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** For the purposes of this case, "exposure" to asbestos should be understood to mean "inhalation" of asbestos, for it is only inhalation that leads to asbestos-related disease.

uncertainties of the time course of the individual's exposure." (469-70). This is hardly evidence of actual exposure and actual likelihood of developing a disease. Thus there is no way for a jury to determine whether plaintiff's alleged fear of developing the disease was reasonable.

The Supreme Court and the Second Circuit are unequivocal in holding that these tests to determine the genuineness of plaintiff's claim must be met. In the case at bar, plaintiff does not fall within the zone of danger as envisioned by the Supreme Court or the Second Circuit: he has not sustained a physical injury; and he offered no evidence to establish that he was sufficiently exposed to asbestos to create a reasonable fear of developing an asbestos related disease. Thus the claim fails as a matter of law.

Emotional Injury

Even if plaintiff had been able to establish that he fell within *Gottshall's* zone of danger, he did not offer sufficient evidence to allow a jury to find that he suffered a real emotional injury.

On this question, no specific form of proof, such as medical testimony, is required. However, the cases dealing with the subject tell us is that there is need for some objective evidence, apart from the plaintiff's own testimony concerning his or her own supposed agony. For example, in *Miner v. City of Glens Falls* (2d. Cir. 1993) 999 F.2d 655, plaintiff was a police officer who lost his job, allegedly without due process. The court found that plaintiff could recover on a claim for negligent infliction of emotional distress because in addition to plaintiff's own testimony of feeling inadequate, embarrassed, anxious and exasperated to such a degree that he contemplated suicide, the court found that

> the anguish he described has some objective correlation with events described by [plaintiff] and by his wife: loss of their house, family tensions, certain potentially demeaning aspects of a former police officer having to seek benefits.

Id. at 663.

Plaintiff in the case at bar provides no analogous objective evidence. Despite the emotional distress plaintiff claims, he continued working in the Grand Central Terminal even though it is undisputed that he could have transferred to any one of several asbestos-free facilities where both he and his father had previously worked. Moreover, even after being warned by a doctor and viewing the videotape about smoking, plaintiff continued to smoke cigarettes "whenever I feel like having one." (773). The only objective fact to which plaintiff testified was that he lost his temper more frequently with his wife, but even that he conceded was related in part to the instant law suit. Moreover, unlike the situation in *Miner*, his wife gave no testimony in support of this claim.***

Dr. Markowitz, who examined plaintiff for almost two hours and was trained in psychology, did not refer plaintiff either to a psychologist or to a social worker. When asked

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*** Plaintiff testified that following the asbestos awareness class in late 1987, he had expressed his anger and concern over what had happened to him by complaining to his Metro-North foremen, supervisors, superintendents, and ultimately to the MTA Inspector General's Office. However, as with the evidence concerning plaintiff's arguments with his wife, no corroborative testimony was offered.

by the Court why he did not make such a referral, he responded that "if [plaintiff] had displayed that level of concern to me I might have considered [referring him to a counselor]. I might have said, well, you ought to get some counseling about this. But I didn't see it." (549)****

Thus, because plaintiff has offered no objective evidence by which a jury could determine that he had suffered a real emotional injury, his claim for negligent infliction of emotional distress must also be dismissed.

SO ORDERED.
New York, New York
March 13, 1995

**** this response was given to a question posed out of the presence of the jury, but is nonetheless part of the record.

STIPULATION TO SUPPLEMENT THE RECORD ON APPEAL

(Title omitted in printing)

STIPULATION TO SUPPLEMENT
THE RECORD ON APPEAL

By and through their respective counsel, the parties in this appeal hereby stipulate as follows:

1. Appellant Michael Buckley ("Buckley") filed this appeal following entry of judgment in favor of appellee Metro-North Commuter Railroad ("Metro-North") following the trial in *Buckley v. Metro-North Commuter Railroad*, U.S.D.C., S.D.N.Y. NO. 89 Civ. 7170 (WK).

2. During the trial of this matter, Buckley introduced the following documents which were marked for identification and received in evidence at trial:

(a) NY AG/MTA IG Joint Report on Asbestos at GCT dated September 19, 1989 (excerpts read to jury) [originally marked as Plaintiff's Exhibit 4010]

(b) Metro-North's EHPC Report on Asbestos at GCT dated June 18, 1986 [originally marked as Plaintiff's Exhibit 2403]

(c) Palmer letter to Muro dated November 5, 1987 [originally marked as Plaintiff's Exhibit 0030]

(d) Excerpt from p. 3 of McHale Memo to Mahoney dated September 3, 1987 regarding

glove bag use (read to jury) [originally marked as Plaintiff's Exhibit 0002]

(e) Memo from Palmer to Seaboldt dated December 6, 1988 with list of locations attached (except for last paragraph on p. 1 redacted) [originally marked as Plaintiff's Exhibit 2429]

(f) Photographs of GCT tunnels [originally marked as Plaintiff's Exhibit 4040]

(g) Metro-North's Training Class "OSHA Awareness Manual" [originally marked as Plaintiff's Exhibit 2051]

(h) Schematic diagram of GCT tunnel system [originally marked as Plaintiff's Exhibit 4020-A]

(i) OSHA asbestos regulations title page and p. 37 excerpts regarding "competent person" and "PEL" [originally marked as Plaintiff's Exhibit 0099]

(j) Metro-North ambient air test results at GCT from January 1985 to June 1988 [originally marked as Plaintiff's Exhibit 0028]

(k) Videotape from Metro-North's asbestos awareness class [originally marked as Plaintiff's Exhibit 0029]

(l) Admitted and Stipulated Facts (as read to jury) [originally marked as Plaintiff's Exhibit 0001]

(m) Metro-North's Galston Survey of Asbestos in the Grand Central Steam Tunnels [originally marked as Plaintiff's Exhibit 4000]

3. In addition, during the trial Buckley sought to introduce the following documents which were marked for identification and/or offered but which were not received in evidence at trial:

(a) Full NY AG/MTA IG Report dated September 19, 1989 as redacted pursuant to J. Knapp's rulings prior to trial [originally marked as Plaintiff's Exhibit 4010]

(b) Cover page of Memorandum dated October 20, 1989 from Mahoney to Nelson regarding Burma Road and Bungalow area [originally marked as Plaintiff's Exhibit 2134]

(c) October 8, 1987 Asbestos Survey of Grand Central Terminal Pipe Tunnels prepared for Metro-North Superintendent Robert Gropper [originally marked as Plaintiff's Exhibit 1178]

(d) Excerpt from McHale Memo to Mahoney at p. 3 regarding "Competent person" and at top of p. 4 regarding asbestos removal [originally marked as Plaintiff's Exhibit 0002]

(e) Metro-North Requisition dated September 22, 1987 regarding asbestos removal in GCT [originally marked as Plaintiff's Exhibit 1078]

(f) Meloney letter dated May 1, 1987 [originally marked as Plaintiff's Exhibit 0050]

4. During the trial Metro-North offered and introduced the following documents which were marked for identification and received in evidence at trial:

(a) Letter dated February 17, 1988 from Dr. Steven B. Markowitz to Ronald Motley re availability of Dr. Markowitz serving as expert witness (originally marked as Defendant's Exhibit "A")

(b) Chart indicating the risk of exposure to lung cancer comparing non-smoker to smoker (originally marked as Defendant's Exhibit "C")

(c) Handwritten notes of R.F. Gropper (Superintendent of Utility Maintenance at Metro-North) (originally marked as Defendant's Exhibit "D")

(d) Letter dated July 7, 1987 from R.F. Gropper to Michael Buckley regarding attendance problems (originally marked as Defendant's Exhibit " E")

(e) Respirator training program attendance roster dated February 17, 1987 (originally marked as Defendant's Exhibit "F")

(f) X-ray release signed by plaintiff dated January 16, 1990 (originally marked as Defendant's Exhibit "G")

(g) X-ray report dated November 6, 1992 (originally marked as Defendant's Exhibit "H")

5. The parties agree that the exhibits listed in paragraphs 2, 3, and 4 above shall be deemed included in the record on appeal and also agree that such exhibits may be included in the appellate Appendix. These exhibits are in the custody of counsel for the respective parties and shall be promptly made available to the Second Circuit Court of Appeals upon request.

Dated: New Haven, Connecticut
June 7, 1995

(Jurat omitted in printing)

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 1, 1996

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 608 -- August Term, 1995

(Argued: December 8, 1995 Decided: April 1, 1996)

Michael BUCKLEY,

Plaintiff-Appellant,

v.

METRO-NORTH COMMUTER RAILROAD,

Defendant-Appellee.

Before:

FEINBERG and OAKES,
Circuit Judges.*

Appeal from the judgment as a matter of law granted by the United States Court for the Southern District of New

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* Honorable Guido Calabresi, C.J., heard oral argument but later disqualified himself and did not participate in the decision of this court.

York, Whitman Knapp, Senior Judge, in favor of Appellee on Appellant's claims for negligent infliction of emotional distress and medical monitoring arising under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.* (1994).

Vacated and remanded.

Charles C. Goetsch, New Haven, CT
(Cahill Goetsch & DiPersia, P.C., of counsel),
for Plaintiff-Appellant.

William G. Ballaine, New York, NY
(Mark S. Landman, Lisa S. Rabinowitz,
Ann Marie Collins, Siff Rosen P.C., of counsel),
for Defendant-Appellee.

OAKES, *Senior Circuit Judge*:

Michael Buckley ("Buckley") appeals from the judgment as a matter of law granted by the United States District Court for the Southern District of New York, Whitman Knapp, *Senior Judge*, in favor of Metro-North Commuter Railroad ("Metro-North"). Buckley claims negligent infliction of emotional distress and medical monitoring costs arising under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* (1994) ("FELA"), for asbestos exposure Buckley suffered while working as a Metro-North pipe fitter in Grand Central Terminal. Buckley claims the district court erred in refusing to submit his negligent infliction of emotional distress claim to the jury and in failing to address his claim for medical monitoring. For the reasons stated below, we vacate and remand.

BACKGROUND

In reviewing the district court's judgment as a matter of law in favor of Metro-North, we consider the facts in the light most favorable to Buckley, the non-moving party. *Purgess v. Sharrock*, 33 F.3d 134, 140 (2d Cir.1994).

Buckley, who is 41 years old, has worked for various railroad companies in different capacities since the early 1970s. In June 1985, he began to work for Metro-North as a pipe fitter, repairing and maintaining the labyrinth of pipes in the steam tunnels of Grand Central Terminal in New York City. These pipes were covered with a white insulation material that Buckley and the other pipe fitters needed to remove before performing any repair or maintenance work. Buckley would hammer, cut, and pull the insulation material, using any tools on hand, in order to expose the pipe. The insulation, a dry, dusty sort of material, would break apart as it was removed, scattering particles into the air--"just like taking baby powder and shaking it," as Buckley said. Fans used to make bearable the intense heat of the steam tunnels would further spread dust from the pieces of insulation that accumulated on the floors of the tunnels. During the work day, this dust would cover Buckley's skin and clothes and enter his nose and mouth, so that he could taste the chalky insulation material. Because Buckley and the other pipe fitters would emerge from their daily duties in the tunnels covered head to toe with white powder, they were dubbed the "snowmen of Grand Central."

The insulation material that Buckley was exposed to during his work day for roughly three years was asbestos, widely recognized as a carcinogen since the mid-1970s. Metro-North admitted that it knew the insulation was composed of asbestos and that asbestos can cause cancer. In fact, Metro-North had been cited for asbestos-related viola-

tions in September 1986 following a fire in Grand Central Terminal. Metro-North further admitted that, despite its knowledge of the problem, it did not warn Buckley that the substance covering him when he emerged from the tunnels was asbestos, nor did it train him regarding safe handling of asbestos.

On August 31, 1987, nearly a year after the fire and the asbestos citations, Metro-North finally required that pipe fitters attend an asbestos awareness class. At this class, Buckley learned of the asbestos in the pipe insulation. He was told that asbestos is a substance that can cause painful, debilitating, and often deadly disease such as asbestosis, lung cancer, and mesothelioma, a cancer of the pleura that lines the outside of the lungs. He viewed videotapes depicting people suffering from these diseases. He received instruction on asbestos removal by the "glove bag" method and was given a half-face respirator. The respirator, however, was not fit-tested. He was also shown a video that explained that smoking increases one's risk of lung cancer, and that smokers exposed to asbestos can decrease their risk of lung cancer if they quit smoking.

Buckley attempted to use the half-face respirator at work, but it fit poorly and slid down his face as he perspired in the intense heat of the steam tunnels. He also attempted to use the glove bag method of removal, but the plastic bags used to isolate the asbestos during the procedure would melt on the hot pipes after the insulation was removed, spilling out the asbestos that was supposed to be safely contained in the bags. In 1991, Buckley, who had smoked heavily since he was seventeen, cut down his smoking to an average of one cigarette a day.

After learning of the asbestos in the insulation, the pipe fitters wrangled with Metro-North over the issue of

safety. They also contacted the White Lung Association, an advocacy group for victims of asbestos exposure, to inform themselves about the hazards of asbestos. When their complaints to Metro-North management went unresolved, the workers contacted the Office of the New York State Attorney General, which investigated Metro-North in conjunction with the Inspector General of the Metropolitan Transit Authority. Because he "wanted Metro-North to be held accountable for what they did," Buckley contacted a law firm to pursue a case against Metro-North, as did as many as 140 other asbestos-exposed workers. Buckley's case was set up as a "test case" for the claims of all of the workers.

Buckley's attorney referred him to the Mount Sinai Occupational and Environmental Health Clinic for a medical evaluation. He was examined by Dr. Steven Markowitz and Dr. William Nicholson, who both testified as experts at trial. The doctors noted that Buckley currently showed no signs of asbestos-related diseases, but explained that the latency period for these diseases is not less than ten years and commonly ranges between 20-40 years. The doctors stated that Buckley was exposed to extremely high levels of asbestos as a pipe fitter for Metro-North, and agreed that, as a result of the asbestos exposure, Buckley suffered an increased risk of dying from an asbestos-related cancer. Dr. Markowitz characterized the increased risk as "significant," and, when pressed, quantified the increased risk as one to three percent. Dr. Nicholson quantified the increased risk as one to five percent, and stated that in his opinion there was a reasonable scientific basis to fear that Buckley will develop an asbestos-related cancer. Dr. Markowitz further noted that Buckley suffers a ten percent higher risk of developing scarring of the lining of the lungs due to on-the-job asbestos exposure.

Dr. Markowitz pointed out that Buckley's exposure could not be documented by x-ray until scarring developed, and a biopsy of the lungs could not be conducted because live tissue samples are not performed until disease has developed. In Dr. Markowitz's opinion, though, while working with the dry, chalky insulation, Buckley inhaled a great deal of thin, needle-like asbestos fibers that have lodged in Buckley's lungs and could create grave health problems later in life. He recommended that Buckley continue to be medically monitored for future signs of asbestos-related diseases, noting that early detection of some of these diseases, such as lung cancer, could improve Buckley's prognosis.

Buckley testified that he is fearful of developing an asbestos-related disease. He is angry at Metro-North and no longer trusts his employer to provide a safe workplace. He said that because of the asbestos exposure he worries about his future, becomes upset when he sees media reports about asbestos, and is overprotective of his young son. He has not, however, undergone any psychiatric treatment for his fears. As he stated, "[w]hat is a psychiatrist going to do for me? What is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?"

After denying Metro-North's motion to dismiss, the district court directed that the case proceed to trial. *See Giammona v. Metro-North Commuter R.R.*, 750 F. Supp. 662 (S.D.N.Y. 1990). In 1994, Buckley became the test plaintiff for the claims of all the exposed employees, and a jury trial commenced in February 1995. Because Metro-North conceded negligence, only the issues of causation and damages were placed before the jury. At the close of Buckley's case, and before Metro-North commenced its case, Metro-North filed a motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The court granted Metro-North's motion and dismissed the jury.

DISCUSSION

Buckley contends the district court erred when it entered a judgment as a matter of law in favor of Metro-North at the close of Buckley's case. He asserts that his claim of negligent infliction of emotional distress and his claim for medical monitoring costs should have been submitted to the jury.

A district court may grant a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 only if no reasonable jury could find for the non-moving party. *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir. 1993). There must be "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture." *Id.* (quoting *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F.2d 163, 168 (2d Cir. 1980)). In examining a motion for judgment as a matter of law, the court "must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor." *Purgess*, 33 F.3d at 140.

In reviewing a judgment as a matter of law, we apply the same standard as the district court. *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 52 F.3d 1124, 1131 (2d Cir. 1995). Here, we must determine whether the district court correctly concluded that no reasonable jury could have found for Buckley on his claim of negligent infliction of emotional distress under FELA.

Section 1 of FELA, 15 U.S.C. § 51 (1994), states:

> Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while

> he is employed by such carrier in such commerce ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.
>
> . . .

Congress designed FELA as a "broad remedial statute" for railroad workers injured on the job because of employer negligence. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561-62, 107 S.Ct. 1410, 1413-14, 94 L.Ed.2d 563 (1987). As the Supreme Court has noted, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Id.* at 561, 107 S.Ct. at 1413. However, "[o]nly to the extent of these explicit statutory alterations is FELA 'an avowed departure from the rules of the common law.' " *Consolidated Rail Corp. v. Gottshall*, ___ U.S. ___, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994) (quoting *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958)). In other respects, the common law retains "great weight" in any judicial consideration. *Id.*

By the plain language of the statute, a "common carrier by railroad" is liable if one of its employee is injured due to the negligence of the common carrier. There is no dispute that Metro-North, a carrier by rails engaged in interstate commerce, employed Buckley. Furthermore, Metro-North has conceded negligence. Thus, this case turns upon whether Buckley's claim of emotional harm suffered as a result of Metro-North's negligence is an injury compensable under FELA.

I. Negligent Infliction of Emotional Distress

In *Gottshall,* the Court stated that "[b]ecause FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in [a court's] decision." *Id.* at 2404. The common law in nearly every state, the Court found, allows plaintiffs to bring claims for negligent infliction of emotional distress and therefore such claims are cognizable under FELA. *Id.* at 2405.

The Court recognized that because "[t]he incidence and severity of emotional injuries are ... more difficult to predict than those of typical physical injuries[,] ... negligent infliction of emotional distress [claims] hold [ ] out the very real possibility of nearly infinite and unpredictable liability for defendants." *Id.* For this reason, the Court noted, the common law has sought to limit recovery for negligent infliction of emotional distress. Some jurisdictions allow recovery only to those whose emotional distress stemmed from a physical impact; others allow recovery to those who, though suffering no physical impact, were within the zone of danger; and still others allow recovery to those who, though not within the zone of danger, witnessed the death or severe injury of a relative. *See id.* at 2406-07.

The Court analyzed these common-law restrictions on negligent infliction of emotional distress claims and adopted the zone of danger test as a proper limitation on recovery, balancing the concern for predictable liability with the broad remedial nature of FELA. The Court found that a negligent infliction of emotional distress claim may be brought by "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 2406, 2410.

Here, the district court found that Buckley did not fulfill the test for negligent infliction of emotional distress actions set forth in *Gottshall* because he did not suffer "sufficient impact with asbestos" to sustain a claim and "failed to prove that he had suffered a real emotional injury." We first address the district court's finding regarding physical impact and then turn to its finding regarding Buckley's emotional injury.

A. Physical Impact

As we noted above, a plaintiff may state a claim for negligent infliction of emotional distress only if the plaintiff suffers a physical impact or the defendant's conduct "threatens [the plaintiff] imminently with physical impact"--the zone of danger test. *Gottshall* at 2410.

We disagree with the district court's finding that Buckley did not suffer "sufficient impact with asbestos" to sustain a claim for negligent infliction of emotional distress. We hold that the district court erred in granting Metro-North a judgment as a matter of law because, from the evidence presented at trial, a reasonable jury could conclude that Buckley suffered a physical impact with asbestos.*

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* Buckley does not claim damages for increased risk of developing disease. In order to recover for an increased risk of disease, as opposed to negligent infliction of emotional distress based upon fear of disease, a plaintiff must show a physical impact and a probability that the disease will actually develop in the future. *See Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 319-20 (5th Cir. 1986), *modified*, 797 F.2d 256 (5th Cir. 1986). The evidence in this case would not support such a claim, because Buckley cannot (continued...)

There is ample evidence in the record that the asbestos dust coated Buckley's skin and clothes, entering his nose, eyes, and mouth. Indeed, he could actually taste the chalky insulation material. When viewed in the light most favorable to Buckley, the evidence shows that he suffered a massive exposure to asbestos.** One need only visualize the image evoked by the pipe fitters' nickname--"the snowmen of Grand Central"--to understand the extent of Buckley's exposure to asbestos.

Furthermore, Buckley's expert witnesses testified that Buckley inhaled a large quantity of thin, needle-like asbestos fibers due to the work conditions imposed by Metro-North. When inhaled, asbestos fibers become imbedded in lung tissue and, according to Buckley's experts, cause subclinical changes to occur. Eventually, after ten to forty years, deadly and debilitating diseases may develop.

Metro-North argues that such exposure does not constitute an impact unless clinical signs of asbestos-related disease develop. Though both experts testified that Buckley's lungs had suffered subclinical changes, they admitted that Buckley had yet to display any verifiable clinical signs of asbestos exposure. However, the evidence Buckley presented

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*(...continued)
demonstrate a probability that he will develop an asbestos-related disease.

** We do not believe that Buckley's claim should be defeated because he cannot quantify the amount of asbestos to which he was exposed. The reason no tests of asbestos levels were performed during the period of exposure was that Metro-North did not wish to disclose the presence of asbestos and therefore did not conduct any such tests.

showed that the absence of clinically verifiable proof is not dispositive. Given the strong evidence of massive exposure and the expert testimony regarding the likelihood of inhalation and its effect, we think a reasonable jury could find that Buckley suffered a physical impact from large amounts of asbestos fibers despite the lack of clinical proof of asbestos exposure. We cannot find as a matter of law that Buckley's injuries are not genuine simply because they are subcellular. The effect of asbestos in the lungs is a subtle, complex matter. It is for the jury, assisted by expert testimony, to determine whether Buckley has suffered present harm.

Our recent decision in *Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 727, 130 L.Ed.2d 631 (1995), supports our conclusion that a reasonable jury could find that Buckley sustained a physical impact from his exposure to asbestos. In *Marchica*, we found that a railroad worker suffered a physical impact sufficient to recover for fear of contracting the AIDS virus when a discarded hypodermic needle stabbed the worker's hand while he was cleaning up an area of a railroad station notorious as a haven for drug users. *Id.* at 1206. We held that, even though it was never determined that the AIDS virus was present in the needle, such an injury "would cause a reasonable person to develop a fear of AIDS." *Id.* We noted that "[h]ad Marchica merely touched the discarded needle and become concerned about the possibility of developing AIDS, the case would stand on a very different footing." *Id.* at 1204. The distinction between a stab wound and a touch rests upon the method by which the AIDS virus is transmitted. The AIDS virus cannot be contracted simply by touching: penetration and contact with body fluid is required. A fear of developing AIDS absent such contact would be unreasonable.

Similarly, the fear of developing an asbestos-related disease from an incidental contact with asbestos would be unreasonable. Asbestos, as the evidence at trial showed, exists in small quantities in the air we breathe each day and such low-level contacts do not in any way affect the vast majority of people. Buckley, however, does not claim that his fear arises from normal contact with asbestos in the ambient air. Rather, as Buckley's counsel explained, Buckley's fear stems from "exposure to hazardous amounts of asbestos for an average of one hour per day while actual[ly] removal[ing], handling and working [with] asbestos insulation ... during the period from June of 1985 to June of 1988." Buckley offered evidence that such an exposure causes a measurable increase in the possibility of his developing asbestos-related disease. Just like the needle puncture in *Marchica*, Buckley's three years of daily contact with the cancer-causing substance--contact that from time to time left him covered from head to toe in asbestos dust--constitutes a physical impact that would lead a reasonable person to fear asbestos-related cancer.

For this reason, we reject the FELA cases finding that asbestos fiber inhalation cannot constitute an injury. *See Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *Amendola v. Kansas City So. Ry. Co.*, 699 F. Supp. 1401, 1403 n. 3, 1410-11 (W.D. Mo. 1988). While these cases express a concern over speculative or frivolous lawsuits, the Marchica case makes clear that the relevant inquiry is whether the impact would cause fear in a reasonable person. To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body. Given the evidence of Buckley's prolonged and pronounced exposure to

asbestos, a jury may find that he suffered an impact that would cause fear in a reasonable person.

Metro-North urges us to follow those common law fear-of-disease cases holding that exposure to a carcinogen is not in and of itself enough to constitute a physical impact. It is true that many cases hold that a fear-of-disease plaintiff must prove both actual exposure to a disease and a reasonable medical probability of later developing a disease. *See Marchica*, 31 F.3d at 1204 and cases cited therein; *Doner v. Ed Adams Contracting Inc.*, 208 A.D.2d 1072, 1072-73, 617 N.Y.S.2d 565, 566 (3d Dept. 1994) (though plaintiff could prove actual exposure to asbestos, plaintiff failed to show he was likely to contract a disease and thus could not prevail on emotional distress claim). Other courts insist a plaintiff prove the exposure caused a present physical injury, that a future disease will likely develop, or that the emotional injury has manifested itself physically. *See Marchica*, 31 F.3d at 1204 and cases cited therein; *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (fear of asbestos disease not rational unless plaintiff experiences functional impairment); *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 378, 752 P.2d 28, 31 (Ct. App. 1987) (no cause of action for fear of disease absent bodily injury); *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 527-28 (Fla. Dist. Ct. App. 1985) (same).

As we noted in *Marchica*, however, such cases are inapposite when, as here, a plaintiff's emotional distress results from an actual physical impact or injury. *See Marchica*, 31 F.3d at 1204.*** Furthermore, many courts

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*** The terms "impact" and "injury" were used interchangeably by the *Marchica* court to describe the needle prick suffered by Marchica.

have found that under certain circumstances exposure to asbestos or other disease- causing agents may constitute an impact sufficient to sustain a claim for fear of disease. *See, e.g., Hagerty*, 788 F.2d at 318 n. 1 (seaman soaked with toxic chemicals suffered a "physical injury from the drenching which constitutes an impact"); *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (prenatal exposure to DES is a physical impact); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 14, 507 N.E.2d 476, 480 (Com. Pl. 1987) (exposure to asbestos while working with insulation is a physical contact sufficient to allow fear of cancer claim to proceed). We choose to follow these cases and hold that a reasonable jury could find that Buckley suffered a physical impact.

We decline to narrow our view of physical impact in order to avoid the flood of litigation that Metro-North claims we will unleash by this decision. First, "a more flexible view" of physical impact is "most consistent with FELA's remedial nature." *Marchica*, 31 F.3d at 1206. Second, only a narrow class of plaintiffs may sue under FELA, *see Gottshall*, 114 S. Ct. at 2412 (Ginsburg, J., dissenting), and FELA protects this group of plaintiffs from the negligent acts of employers to a greater extent than the plaintiffs would be protected at common law. Third, even within the narrow class of FELA plaintiffs, Buckley and the other "snowmen" present what we believe is an unusual case, as Buckley's exposure to asbestos was massive, lengthy, and tangible. Finally, Metro-North has admitted that it negligently allowed the pipe fitters to perform their duties without any knowledge on their part of the presence of asbestos or any training in its proper handling. We do not believe that the magnitude of Metro-North's wrong should limit the damages awarded against it. Thus, taking all inferences in favor of Buckley, we find that a jury, presented with the evidence in this case, may find that

Buckley suffered an impact that would cause fear in a reasonable person.

B. Emotional Injury

Even if a plaintiff suffers a physical impact that would cause fear in a reasonable person, the plaintiff will not be permitted to recover unless he or she actually suffers an emotional injury as a result of the physical impact. The district court held that no reasonable jury would find that Buckley suffered emotional distress. Because the district court believed that Buckley offered no corroborating evidence of his emotional distress, and because Buckley continued to smoke cigarettes after learning that smoking increases the risk to those exposed to asbestos, the court held that Buckley's claimed emotional distress was not serious enough to be compensable.

Though a plaintiff need not present medical proof of emotional distress, some *objective* proof apart from plaintiff's testimony must be offered in order for a jury to determine that the plaintiff suffered real emotional injury. *Miner v. City of Glens Falls*, 999 F.2d 655, 663 (2d Cir.1993). We disagree with the district court that there is a complete lack of objective proof in this case. Buckley testified that because of his fear and anger, he complained first to his supervisors and then to the Metropolitan Transit Authority Inspector General ("I.G.") about the asbestos in the tunnels. The district court said Buckley failed to corroborate these complaints, but one worker who testified, Gregory Peck, stated that "we went to the I.G." when asked on cross-examination how he found out that "everything that [Metro-North] did was wrong." In addition, the joint report issued by the I.G. and the New York State Attorney General's Office, admitted into evidence, detailed the workers' complaints to supervisors

and investigative bodies. This evidence, though slim, may provide substantiation of Buckley's claim.

Metro-North urges that regardless of whether Buckley provided any objective proof of emotional distress, he has not suffered emotional injury severe enough to sustain his claim. To permit an award for emotional distress arising out of a fear of cancer, a plaintiff must "introduce evidence of his particular fears with some specificity" and "as a threshold matter, present evidence of his particular fear of developing cancerous conditions." *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 858-59 (5th Cir. 1988). Buckley's testimony about his anger and fear of dying satisfies this burden. It appears from our review of case law that emotional distress must be "severe" only when a plaintiff has not suffered a physical impact. In such a case, the severity of the emotional distress serves to guarantee the genuineness of the claim. *See Lacy v. Cooper Hosp./Univ. Med. Ctr.*, 745 F. Supp. 1029, 1035-36 (D.N.J. 1990); *Lavelle*, 30 Ohio Misc.2d at 14-15, 507 N.E.2d at 480-81; *Restatement (Second) of Torts* § 436A (1965); *compare Restatement (Second)* § 46 (to prove *intentional* infliction of emotional distress, plaintiff's emotional distress must be "so severe that no reasonable [person] could be expected to endure it"). Here, as we discussed above, a reasonable jury could find that Buckley has suffered a physical impact. Buckley is therefore entitled to all damages flowing from the impact, including his reasonable emotional distress, so long as the jury finds based upon Buckley's testimony and objective evidence that Buckley actually suffers from the fear and anger he claims.

We realize that the evidence of Buckley's emotional distress is not overwhelming. He does not suffer the sort of severe distress claimed by the plaintiff in *Marchica*, 31 F.3d at 1201, and there is not an abundance of evidence corroborating his claims. However, we do not believe that a jury

need rely only upon "sheer surmise and conjecture," *Samuels*, 992 F.2d at 14, in order to find Buckley suffered emotional distress. Therefore, we find that the district court erred in granting Metro-North a judgment as a matter of law on Buckley's negligent infliction of emotional distress claim.

II. Medical Monitoring Costs

As a separate claim, Buckley seeks to recover for the cost of future medical monitoring. The district court failed to address this claim at all in its judgment as a matter of law in favor of Metro-North. We find that medical monitoring costs are a reasonable basis for an award of damages in this case. We believe that the evidence presented by Buckley could convince a reasonable jury to grant medical monitoring damages.

Dr. Markowitz testified that because of Buckley's exposure to asbestos, he is at an increased risk of developing an asbestos-related disease which will peak between the ages of fifty and sixty-five. Dr. Markowitz stated that because of this risk, Buckley should be provided with present and future medical monitoring in order to detect and treat the diseases as they may arise, including an annual medical exam with pulmonary function tests and chest x- rays. Beginning at age 45, Buckley should also undergo a sigmoidoscopy and stool tests every other year. Dr. Markowitz estimated the annualized cost of these tests at $950.00.

It is hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred as a result of an injury. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 90 (1935). We believe that Buckley should be compensated for such medical monitoring as is reasonably necessary according to contemporary medical principles applied by physicians experienced in the diagnosis and

treatment of asbestos diseases. We agree with a number of other courts that such costs are

> a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure ... the toxicity of [asbestos], the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, ... surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary.

Ayers v. Township of Jackson, 106 N.J. 557, 606, 525 A.2d 287, 312 (1987). We find that Buckley may recover such costs despite the fact that he has yet to suffer an asbestos-related disease. As one court has noted, "the appropriate inquiry is not whether it is reasonably probable that plaintiffs will suffer harm in the future, but rather whether medical monitoring is ... necessary in order to diagnose properly the warning signs of disease." *In re Paoli R.R. Yard PCB Litigation (Paoli I)*, 916 F.2d 829, 851 (3d Cir. 1990), *cert. denied*, 499 U.S. 961, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991). *See also Gibbs v. E.I. DuPont de Nemours & Co., Inc.*, 876 F. Supp. 475, 478 (W.D.N.Y. 1995) (citing *Paoli I* with approval); *Gerardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657, 659, 566 N.Y.S.2d 1002, 1004 (Sup. Ct. 1991) (defendant liable for medical monitoring expenses incurred by plaintiff due to "invasion of the body by toxic substances through negligent exposure"); *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130, 137, 477 N.Y.S.2d 242, 247 (4th Dept. 1984) (medical monitoring cost recoverable if plaintiff can establish to a reasonable degree of medical certainty that costs are "reasonably anticipated"); *Potter v. Firestone Tire & Rubber Co.*, 6

Cal.4th 965, 1006-07, 25 Cal. Rptr.2d 550, 863 P.2d 795, 822-23 (1993) (even in the absence of physical injury, reasonably certain medical monitoring costs may be recovered). Given the expert testimony in this case regarding impact, increased risk, and the necessity of monitoring, a reasonable jury could award Buckley medical monitoring costs.

Any award should be limited to costs incurred as a direct result of Buckley's asbestos exposure, rather than as a result of his history of smoking. We agree with the Third Circuit that a plaintiff must:

> prove that by reason of the exposure to the toxic substance caused by the defendant's negligence, a reasonable physician would prescribe for her or him a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure. This is because under this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff.

In re Paoli R.R. Yard PCB Litigation (Paoli II), 35 F.3d 717, 788 (3d Cir. 1994) (quoting *Hansen v. CCI Mech.*, 858 P.2d 970, 980 (Utah 1993) (citations omitted)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1253, 131 L.Ed.2d 134 (1995). Therefore, a jury may only award to Buckley damages for that medical monitoring which is necessary because of his exposure to asbestos.

Competent expert testimony in this case established both that Buckley suffered a substantial impact from asbestos that has significantly increased his risk of contracting an asbestos-related disease and that Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos-related disease he develops. The costs of such tests are a traditional element of tort damages, and a reasonable jury may award them to Buckley in this case.

CONCLUSION

For the reasons stated above, we vacate the judgment as a matter of law entered in favor of Metro-North and remand this case to the district court for a jury trial.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10 day of July one thousand nine hundred and ninety-six.

Michael Buckley,

Plaintiff-Appellant,

v. Dkt No. 95-7399

Metro-North Commuter
Railroad Company

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Metro-North Commuter Railroad Company's.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

(Jurat omitted in printing)

STATUTE INVOLVED

UNITED STATES CODE

TITLE 45 -- RAILROADS

CHAPTER 2--LIABILITY FOR INJURIES TO EMPLOYEES

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries of employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or

foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

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No. 96-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in ruling that mere exposure to a potentially harmful substance, in the absence of any physical injury or disease, is a sufficient basis for recovery under section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51?

2. Whether the Second Circuit erred in holding that under *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the zone of danger test is satisfied in FELA cases where an employee alleges mere exposure over a period of time to a potentially hazardous substance, but where there is no claim of actual physical injury or risk or fear of immediate physical injury?

3. Whether the Second Circuit, in contravention of this Court's opinion in *Gottshall*, has improperly discarded the essential common law requirements imposed to place rational limits on liability for negligent infliction of emotional distress: namely, (i) proof of physical injury, (ii) evidence of physical manifestation of emotional harm, and (iii) proof of emotional distress that is severe and substantiated by objective medical, psychiatric or clinical evidence?

4. Whether the Second Circuit erred in ruling that FELA permits a totally asymptomatic plaintiff to recover damages for future medical monitoring costs, a ruling that is in direct conflict with FELA's express statutory requirement of "injury" as a prerequisite to recovery?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner, Metro-North Commuter Railroad Company, is a public benefit corporation of the State of New York and is a subsidiary of the Metropolitan Transportation Authority, a public benefit corporation of the State of New York. *See* New York Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law §§ 1260 to 1279-b (McKinney 1982 & Supp. 1996). Metro-North Commuter Railroad Company does not have any subsidiary companies.

Respondent Michael Buckley is an individual.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, reproduced at Joint Appendix ("JA") 617-25, has not been officially reported. The opinion of the United States Court of Appeals for the Second Circuit (JA 631-51) is reported at 79 F.3d 1337.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1996, and Metro-North's timely petition for rehearing was denied on July 10, 1996. A petition for certiorari was filed on August 29, 1996, and granted on November 1, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, is set forth at JA 654-55.

STATEMENT OF THE CASE

This case arises from plaintiff Michael Buckley's exposure to asbestos-containing insulation while working for Metro-North as a pipefitter in Grand Central Terminal in New York City. (JA 618) Plaintiff seeks damages for negligent infliction of emotional distress and for future medical monitoring under FELA. (JA 620) Plaintiff is the "test plaintiff" for a group of approximately 140 plaintiffs, with varying degrees of alleged asbestos exposure, asserting similar claims against Metro-North. (JA 635)

The parties stipulated at trial that Metro-North had negligently allowed plaintiff to be exposed to asbestos between June 1985 and September 1987. (JA 594) Trial proceeded on the issues of injury, damages, and causation. Plaintiff testified that over the period in question he was exposed to

asbestos an average of one hour per day.[1] (JA 415; JA 618)

It is undisputed that plaintiff has no asbestos-related disease or physical injury and in fact shows no physical effect of any kind from asbestos exposure.[2] (JA 196; JA 619; JA 641) In 1990, plaintiff was examined, x-rayed and given pulmonary function tests by a doctor at Mount Sinai Medical Center, one of the world's leading research centers on asbestos and health, and no asbestos disease was found. (JA 460-63; JA 114-17) Plaintiff was again examined, x-rayed and tested at Mount Sinai in 1994. (JA 69-73) According to plaintiff's expert Dr. Steven Markowitz, who performed the 1994 examination, plaintiff "was fine." (JA 73) His "breathing was normal and the x-ray was normal." (JA 74) Dr. Markowitz testified that plaintiff "has absolutely no asbestos-related disease" and "has absolutely no pleural thickening." (JA 118) Dr. Markowitz stated that there was no evidence of a "clinical impact" from asbestos on plaintiff's lungs. (JA 135) Indeed, he could find no clinical evidence of disease or even of exposure. (JA 196)

It is also undisputed that plaintiff is not likely to develop an asbestos-related disease. (JA 640-41) Dr. Markowitz quantified plaintiff's risk of getting a disease "that he wouldn't have had had he not been exposed to the asbestos" as in the "1 or 2 or 3 percent" range. (JA 86) Dr. William Nicholson of Mount Sinai, plaintiff's expert in occupational environmental health hazards, testified that

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[1] Because the district court directed a verdict for Metro-North at the close of plaintiff's case, no ultimate findings of fact were made.

[2] Plaintiff's amended complaint expressly states that he is "not bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness" or for any such condition "which may occur in the future." *See* Plaintiff's Amended Complaint ¶ 19. (JA 17)

plaintiff had an increased risk of dying from cancer as a result of his exposure to asbestos of between 1 and 5 percent. (JA 242) Dr. Nicholson further testified that "a death from asbestosis is not something Mr. Buckley has to worry about, although he might develop shortness of breath." (JA 243)

Plaintiff's claim for emotional distress is based solely on his own subjective testimony that he was "mad," "scared," "upset," and "angry" at Metro-North. (JA 443) He "wanted Metro-North to be held accountable for what they did." (JA 456, JA 458) Plaintiff does not suffer from any physical manifestation of his alleged emotional distress. His alleged distress is not documented by any objective medical, psychiatric or clinical evidence of any kind. (JA 623-25) He did not see a physician regarding his asbestos exposure until 1990, three years after his exposure had ended, when his attorney referred him to Mount Sinai. (JA 517-25) Plaintiff testified that he never sought or underwent psychiatric treatment, saw a social worker or counselor, or took any prescription drugs for his alleged emotional trauma and fear of asbestos-related disease. (JA 519-20) According to Dr. Markowitz, plaintiff did not display a level of concern warranting counseling. (JA 205-06; JA 624-25)

Plaintiff, who smoked approximately one pack of cigarettes per day, was shown a videotape by Metro-North in 1987 that graphically depicted persons dying of asbestos-related disease and warned that asbestos-exposed smokers could significantly reduce their risk of developing lung cancer if they quit smoking. (JA 619) Even after viewing the videotape, plaintiff continued to smoke approximately one pack of cigarettes per day until 1991. (JA 619) He testified that he still smokes cigarettes "whenever I feel like having one." (JA 491)

At the close of plaintiff's case-in-chief at trial, the district court (Hon. Whitman Knapp, U.S.D.J.) granted Metro-

North's motion for a directed verdict. The district court held that plaintiff's exposure to asbestos did not satisfy the common law "zone of danger" test, which this Court has adopted as a limitation on recovery for negligent infliction of emotional distress under FELA. (JA 620 (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994))). The district court also found that plaintiff "offered no objective evidence by which a jury could determine that he had suffered a real emotional injury" (JA 625) and that "there [was] no way for a jury to determine whether plaintiff's alleged fear of developing the disease was reasonable." (JA 623)

The Second Circuit reversed, holding that plaintiff could recover for negligent infliction of emotional distress because his exposure to asbestos was a "physical impact" and, by itself, satisfied the *Gottshall* zone of danger test. (JA 640-46) The Second Circuit stated that plaintiff could recover even though he did not suffer severe emotional distress or psychiatric harm, showed no physical manifestation of emotional distress, and presented no competent psychiatric, medical or clinical evidence of emotional distress. (JA 647-48) Further, the Second Circuit held that, despite the absence of physical injury or any likelihood of future injury, plaintiff could recover medical monitoring damages under FELA. (JA 648-51) On July 10, 1996, the Second Circuit denied Metro-North's timely petition for rehearing with suggestion for rehearing en banc. (JA 652-53)

SUMMARY OF ARGUMENT

The Second Circuit in this case held that a plaintiff suing under FELA may recover for emotional distress and medical monitoring if he has been "physically impacted" by exposure to asbestos, even though he has not developed and, according to his own experts, probably will never develop any disease or injury as a result of that exposure. The Second Circuit's decision impermissibly rejects the

overwhelming majority of FELA and common law authority, which holds that exposure to asbestos, without asbestos-related physical injury, does not constitute a basis for recovery. *See, e.g., Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). As the Third, Fourth, and Fifth Circuits and numerous other courts have held, this majority rule properly governs all claims based on asbestos exposure, including claims for emotional distress and fear of cancer. By allowing an asymptomatic plaintiff to pursue claims for emotional distress and future medical monitoring costs, based on his mere exposure to asbestos, the Second Circuit has drastically and improperly expanded liability under FELA.

The Second Circuit's decision also is fundamentally inconsistent with this Court's recent decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). In *Gottshall*, this Court held that emotional distress, absent physical injury, is compensable under FELA only if it meets the threshold standard of the common law "zone of danger" test. *See* 512 U.S. at 556. In determining that plaintiff's exposure over time to asbestos satisfied the zone of danger test, the Second Circuit wrenched the test out of its common law boundaries. Well-settled law has restricted the test to claims arising out of sudden accidents or other traumatic events, which threaten a plaintiff with *imminent* physical harm, thereby causing the plaintiff to suffer fright and to fear for his own safety. Contrary to the Second Circuit, recent FELA decisions by federal and state appellate courts make clear that these traditional elements are required under the *Gottshall* zone of danger test. Moreover, the Second Circuit's decision conflicts with decisions by the Fifth Circuit and other courts, which have held that under the common law asbestos exposure cases do not meet the zone of danger test because these traditional elements are absent. In fact, Metro-North has found no other

decision ruling that the zone of danger test is met in this context.

Plaintiff's failure to satisfy the threshold zone of danger test in itself defeats his emotional distress claim. Plaintiff's claim, however, also fails to meet all the other requirements that the common law imposes -- and the Second Circuit rejected -- to place rational limits on liability for negligent infliction of emotional distress: namely, that a plaintiff's distress be severe, result in a physical manifestation, and be established by competent medical, psychiatric or clinical evidence. The Second Circuit's rejection of these requirements is irreconcilable with this Court's pronouncement in *Gottshall* that under FELA courts are not free to discard such common law restrictions on "the specter of unlimited and unpredictable liability." *See* 512 U.S. at 557.

The combined effect of the Second Circuit's holdings is an unprecedented and unjustifiable expansion of liability for negligent infliction of emotional distress. Under the Second Circuit's decision, every railroad worker alleging mere exposure to asbestos or other potentially harmful substances may have a claim under FELA for emotional distress, including distress that is trivial, insubstantial, or evanescent. Such a result is contrary to the great weight of authority under both FELA and the common law.

Finally, the Second Circuit's holding that a claim for medical monitoring damages is cognizable under FELA despite the absence of any physical injury is directly contrary to the statute's express requirement of an "injury" as a precondition to recovery.[3] *See* 45 U.S.C. § 51. Moreover, it

[3] Plaintiff's purported need for medical monitoring does not arise from his alleged emotional injury, but rather from the possibility that he may at some time in the future develop an asbestos-related physical injury. Therefore, his alleged emotional injury cannot serve as the basis for recovery of medical monitoring damages.

is contrary to the basic common law principle that there can be no cause of action in tort without an actual injury. As *Schweitzer* and other cases make clear, under FELA, "injury" from asbestos exposure exists, and a cause of action may be deemed to have accrued, only when an asbestos-related disease is present. Alleged "subclinical changes," without any impairment or disease, are just that: merely changes, not cognizable injuries. *See Schweitzer*, 758 F.2d at 942; *cf. Urie v. Thompson*, 337 U.S. 163, 169-70 (1949) (worker exposed to silica dust is injured, and his cause of action accrues under FELA, only when adverse effects manifest themselves).

The Second Circuit's expansive rulings, if affirmed, will have extraordinary economic consequences upon railroads under FELA as well as upon other entities, governmental and non-governmental, under other federal statutes and the common law. The Second Circuit attempted to minimize the importance and influence of this case by stating that its rulings applied only to "massive[ly]" exposed railroad workers suing under FELA. (JA 645) However, the legal and factual issues presented by this case are not peculiar to FELA or to railroad workers, or even to asbestos. Rather, they are recurring issues in cases involving exposure to potentially harmful substances where a plaintiff has not as yet developed a physical injury and may never do so. Clearly, this case will influence the development of the law in every jurisdiction that is now or may in the future be grappling with these issues. Metro-North respectfully submits that a reversal of the Second Circuit's decision by this Court would not only be legally correct under FELA, but would advance important policy concerns affecting the

nation's courts, individual litigants, businesses, and the public at large.

ARGUMENT

I. THE SECOND CIRCUIT ERRED IN HOLDING THAT AN ASYMPTOMATIC PLAINTIFF WHO WAS EXPOSED TO ASBESTOS MAY RECOVER UNDER FELA FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The Second Circuit held in this case that exposure to asbestos, without any indication of disease or injury, can serve as a basis for recovery for the negligent infliction of emotional distress under FELA and the zone of danger test adopted by this Court in *Gottshall*. In so holding, the Second Circuit expressly "rejected the FELA cases finding that asbestos fiber inhalation cannot constitute an injury," including specifically the Third Circuit's decision in *Schweitzer*. (JA 643) The *Schweitzer* rule is identical to the common law of the vast majority of jurisdictions, including cases where claims for emotional distress or fear of cancer have been asserted. In abandoning the rule adopted by the overwhelming number of courts, the Second Circuit improperly ignored this Court's admonition in *Gottshall* to adhere to the common law in deciding FELA cases. *See Gottshall*, 512 U.S. at 543-44, 554-55, 557. Moreover, the Second Circuit's decision flies in the face of the policy concerns that underlie the common law and that are central to this Court's FELA jurisprudence.

A. Contrary to the Second Circuit, the Overwhelming Majority of Authority under FELA and the Common Law Correctly Requires Physical Injury as a Prerequisite to Recovery for Emotional Distress in Cases Involving Exposure to Potentially Harmful Substances

In *Schweitzer*, an asbestos exposure case arising under FELA, the Third Circuit held (in contrast to the Second Circuit here) that "subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." *Schweitzer*, 758 F.2d at 942. The *Schweitzer* court relied on this Court's landmark decision in *Urie v. Thompson*, 337 U.S. 163, 170 (1949), where this Court ruled that an employee exposed to silica dust "can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." Although *Schweitzer* is not an emotional distress case, the *Schweitzer* rule properly governs claims for emotional distress arising from asbestos exposure. As discussed below at Point II, in the absence of physical injury, emotional distress claims are cognizable under FELA only when they meet the zone of danger test. The required elements of that test are not met in asbestos exposure cases, and therefore, physical injury remains a prerequisite to recovery.

The Second Circuit's refusal to apply the rule in *Schweitzer* conflicts with the overwhelming majority of asbestos exposure cases under FELA, the Jones Act,[4] other

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[4] The Jones Act incorporates Section 1 of FELA, 45 U.S.C. § 51. *See* 46 U.S.C. app. § 688(a). In determining the scope of liability under the Jones Act, as well as under general federal maritime law, courts look to case law under FELA. *See, e.g., Chan v. Society Expe-*

federal statutes, and the common law, in which claims for emotional distress or fear of cancer have been alleged. For example, the court in *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988), dismissed claims brought under FELA for mental anguish allegedly caused by asbestos exposure where there was no physical harm, noting that such a rule was necessary to "keep[] the floodgates intact." 699 F. Supp. at 1410-11. *See also Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761, at *1-3 (N.D. Ill. May 9, 1986) (dismissing FELA claims based on asbestos exposure where no current injury was alleged, citing *Schweitzer*); *In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. 2 MDL 875, 1996 WL 239863, at *5 (E.D. Pa. May 2, 1996) (dismissing Jones Act and state law claims based on mere asbestos exposure). Similarly, courts have rejected claims for emotional distress based on exposure, without physical injury, to a potentially harmful substance, under the Federal Tort Claims Act and 42 U.S.C. § 1983. *See Redland Soccer Club, Inc. v. Department of Army*, 55 F.3d 827, 848 (3d Cir. 1995) (rejecting emotional distress claims based upon exposure to PCBs without present physical injury under the Federal Tort Claims Act and Pennsylvania law), *cert. denied*, 116 S. Ct. 772 (1996); *Fontroy v. Owens*, No. CIV. A. 86-4958, 1996 WL 571149, at *3-4 (E.D. Pa. Oct. 2, 1996) (rejecting emotional distress claims based on exposure without injury to asbestos under 42 U.S.C. § 1983).

Likewise, the Third, Fourth, and Fifth Circuits have held that under the common law exposure to asbestos or other substances, without physical harm, cannot support a claim for negligent infliction of emotional distress. In *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d

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ditions, Inc., 39 F.3d 1398, 1408-09 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995).

Cir. 1985), the Third Circuit concluded that under Pennsylvania law exposure to asbestos without physical injury does not support recovery for negligent infliction of emotional distress. Similarly, in *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 38 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992), the Fourth Circuit observed that under Virginia law "mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for their emotional distress." So, too, in *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986), the Fifth Circuit determined that Louisiana law did not permit recovery for emotional distress based on asbestos exposure where there is no physical injury from the exposure.[5]

In addition, numerous state courts have adhered to the *Schweitzer* rule and held that physical injury is a prerequisite to recovery for emotional distress claims based on exposure to asbestos and other harmful substances. Just recently, in *Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996), the Supreme Court of Pennsylvania concluded that "[n]othwithstanding the fact that [plaintiffs'] fear pres-

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[5] *Accord, e.g., Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (New Jersey and Pennsylvania law) (no cause of action for negligent infliction of emotional distress based on asbestos exposure in the absence of physical injury); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (Hawaii law) (same); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988) (Louisiana law) (present PCB-related injury a predicate for recovery for mental anguish arising from exposure to PCBs), *aff'd*, 872 F.2d 422 (5th Cir. 1989); *cf. Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.) (*en banc*) (Mississippi law) (asbestos exposure without physical harm not legally cognizable injury), *cert. denied*, 478 U.S. 1022 (1986); *Angus v. Shiley Inc.*, 989 F.2d 142, 147-48 (3d Cir. 1993) (Pennsylvania law) (denying recovery for negligent infliction of emotional distress to uninjured recipient of heart valve allegedly prone to failure).

ently exists, . . . because asymptomatic pleural thickening [from asbestos exposure] is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable." The Supreme Court of Kentucky has rejected claims for emotional distress based on asbestos exposure unless "the plaintiff can cross the threshold of establishing a harmful change has resulted from exposure to the potentially cancer producing agent." *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 194 (Ky. 1994); *see also Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984) (in asbestos exposure case, requiring present physical injury as element of claim for mental anguish); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 905 (Va. 1981) ("legally and medically there was no injury upon inhalation of defendants' asbestos fibers").[6]

The application of the *Schweitzer* rule in emotional distress cases rests on the same principles and policy considerations that this Court identified in *Gottshall*. Specifically, this Court mandated in *Gottshall* that courts applying FELA must look to the common law's substantial limitations on recovery for purely emotional injuries. *See*

[6] *Accord, e.g., Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (citing *Schweitzer*, no recovery for emotional distress for plaintiffs with no asbestos-related disease because "[j]ustice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease"), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 528 (Fl. Dist. Ct. App. 1985) (same), *review denied*, 492 So. 2d 1331 (Fla. 1986); *Doner v. Ed Adams Contracting, Inc.*, 617 N.Y.S.2d 565, 566 (App. Div. 1994) (denying recovery for emotional distress to uninjured, asbestos-exposed plaintiff); *cf. Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 542-43 (Me. 1986) (inhalation of asbestos is not compensable injury); *Pfizer, Inc. v. Farsian*, No. 1941153, 1996 WL 496381, at *3-4 (Ala. Aug. 30, 1996) (disallowing recovery for emotional distress of uninjured recipient of heart valve purportedly prone to failure).

Gottshall, 512 U.S. at 544-49, 554-57. The Second Circuit discounted the policies underlying these limitations and sought to minimize the effect of its ruling by noting that "only a narrow class of plaintiff may sue under FELA." (JA 645 (citing *Gottshall*, 512 U.S. at 559-60 (Ginsburg, J., dissenting))) In so doing, the Second Circuit ignored this Court's admonition in *Gottshall* that the need to carefully limit liability exists "as a practical matter in the FELA context as well, even though the statute limits recovery to railroad workers." *Gottshall*, 512 U.S. at 553.

Simply put, the fact that this is a FELA case does not mean that it is of narrow applicability. As the American Association of Railroads ("AAR") observes in its *amicus* brief, since 1990 more than 14,000 new asbestos personal injury cases have been filed under FELA against American railroads. *See* AAR Br. at 14. Furthermore, this case, if affirmed, will undoubtedly be cited as precedent by FELA plaintiffs alleging exposure to a host of other substances, such as chemical solvents, benzene, silica dust, and diesel fumes. *See id.* at 15 ("Since 1990, over 2000 FELA claims have been filed against railroads alleging exposure to various toxic substances (other than asbestos)."). Moreover, this Court's resolution of the issues in this case will undoubtedly be looked to as authority by untold thousands of litigants in common law actions brought against product manufacturers, sellers, and others.[7] Thus, if the Second

[7] Because this Court's FELA decisions analyze and apply common law principles, those decisions are frequently relied upon by courts and litigants in common law cases. For example, this Court's 1994 opinion in *Gottshall* has already been cited in a number of state court opinions. *See, e.g., Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. Ct. App. 1994); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995). Similarly, this Court's opinion in *Urie* continues to exercise great authority in common law cases even after fifty years. *See, e.g., Haussecker v. Childs*, No. 08-95-00345-CV, 1996 WL 674430, at *5

Circuit's erroneous and unprecedented departure from the *Schweitzer* rule is affirmed, the threat of a flood of emotional distress claims by uninjured plaintiffs who have been exposed to asbestos or other substances will be real.

As the Third Circuit observed in *Schweitzer*, allowing recovery based on exposure alone would create limitless liability:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

758 F.2d at 942. The *Schweitzer* court concluded that "[r]equiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered." *Id.*

Similarly, United States District Judge Charles Weiner, who presides over the federal multidistrict asbestos personal injury litigation, recently dismissed the Jones Act and state law claims of 261 plaintiffs who alleged exposure to asbestos but had proffered no evidence of asbestos-related physical injury. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *5. Judge Weiner observed that the "judicial system has been faced with an onslaught of per-

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(Tex. App. Nov. 21, 1996); *Rogerson v. Fitzpatrick*, 468 S.E.2d 447, 451 (N.C. Ct. App. 1996).

sonal injury, asbestos cases for more than twenty years." *Id.* at *2.[8] Citing the policy concerns set forth in *Schweitzer*, Judge Weiner emphasized that plaintiffs who actually have asbestos-related diseases "suffer while the [c]ourt [system] is clogged" with filings by exposed plaintiffs who (like plaintiff here) have no asbestos-related injuries. *Id.* at *5; *see also* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 575-76 (1992) (observing that "[v]irtually all asbestos-exposed but unimpaired workers can plausibly assert a cancerphobia claim" and arguing that "[a]s between the claims of the already impaired and the claims of those who are not now (and may never become) sick, but who genuinely fear becoming so, society should accord higher priority to the former").

B. The Second Circuit Erred in Permitting Recovery Based Upon "Massive" Exposure

In place of the *Schweitzer* rule, the Second Circuit announced a rule that purports to limit recovery to "unusual" cases of "massive" and "lengthy" asbestos exposure. (JA 645). Yet, the "massive" exposure standard adopted by the Second Circuit does not impose any meaningful constraints upon claims for emotional distress, as this Court's decision in *Gottshall* requires.

The term "massive" exposure is not, as the Second Circuit seems to believe, an objective or quantifiable standard by which to limit liability. On the contrary, the term

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[8] Judge Weiner reported that approximately 37,000 asbestos personal injury cases are now pending in the federal court system. *See* 1996 WL 239863, at *1. As of 1992, an estimated additional 130,000 asbestos cases were pending in state courts. *See* William W. Schwarzer *et al., Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 Tex. L. Rev. 1529, 1530 (1995).

"massive" is inherently imprecise and without definition in the scientific and medical literature. The only guidance the Second Circuit provides is to distinguish "massive" exposure from every day exposure to asbestos in the "ambient air." (JA 643) Thus, "massive" exposure becomes any exposure to asbestos at some indeterminate level above normal background levels. Such an ill-defined standard potentially renders every workplace exposure a "massive" one.[9]

The illogicality of the Second Circuit's standard is underscored by the fact that "of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer." *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1569-70 (citing research). Indeed, as the Second Circuit recognizes, in spite of his so-called "massive" exposure, plaintiff here cannot establish that he is more likely than not to develop an asbestos-related disease. (JA 640-41) Moreover, as the Second Circuit also states, plaintiff's own experts could not find "any verifiable clinical signs of asbestos exposure." (JA 641)

In addition, the Second Circuit does not provide any factual basis for its assumption that plaintiff's exposure was "unusual." Indeed, a 1981 study for the United States

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[9] The Second Circuit, in classifying plaintiff's exposure as "massive," reasoned that "[o]ne need only visualize the image" of the plaintiff's appearance after an hour's labor (JA 641) -- hardly a scientific model or standard. There are no benchmarks whatsoever to use in determining whether an exposure is "massive." Under this undefined standard, any plaintiff who hires an expert, or even testifies as to his own appearance after exposure, will likely survive summary judgment. The jury will be left at best as the arbiter of a battle of the experts or, under the Second Circuit's approach, as the arbiter of plaintiff's appearance. The outcome is almost certain to be unpredictable and entirely subjective.

Department of Labor by a leading researcher on asbestos and health estimated that more than 21 million living American workers had been "significantly exposed" to asbestos during the previous 40 years. Irving J. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United States* xiv (1981); *see also Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 & n.15 (5th Cir. 1985) (*en banc*) (discussing Selikoff study); *Eagle-Picher*, 481 So. 2d at 528 & n.18 ("millions of people have been exposed to asbestos"; permitting uninjured plaintiffs to recover on a claim for fear of cancer "would likely devastate the court system as well as the defendant manufacturers"). Furthermore, the simple fact is that asbestos remains present in many of the nation's schools, homes, office buildings, factories, and public edifices. People repairing, renovating, demolishing, or removing asbestos from buildings have been, and undoubtedly will be in the future, exposed at times to significant levels of asbestos.[10] Such exposures will in all probability give rise to suits such as the instant one. An unlimited number of persons exposed to asbestos could thus plausibly assert that their asbestos exposure would be sufficient to entitle them to recover for emotional distress damages under the Second Circuit's ruling. Therefore, the "massive" exposure standard adopted by the Second Circuit in this case imposes no meaningful constraints upon claims for emotional distress.

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[10] *See, e.g.*, W. Keith C. Morgan & Anthony Seaton, *Occupational Lung Diseases*, 315 (1995); W. Raymond Parkes, *Occupational Lung Disorders*, 415 (3d ed. 1994).

C. The Second Circuit's Decision Will Create Intractable Problems with Regard to Claim-splitting and Statutes of Limitations

The Second Circuit's rejection of the *Schweitzer* rule does violence to the FELA and general common law proscription against claim-splitting. Although not considered by the Second Circuit, the "single recovery" rule established under this Court's FELA jurisprudence is unavoidably implicated by the Second Circuit's decision. This Court has held that under FELA only one recovery may be had by an employee for an employer's wrongful act, and that the employee's right to recover is then extinguished. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931); *cf. Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 598-99 (1974) (Powell, J., dissenting) (arguing that general maritime law should follow Jones Act and FELA, where if employee has "received satisfaction . . . by adjudication in the courts, no further right of action exist[s]").

In the usual zone of danger case, no issue of claim-splitting arises: a plaintiff who escapes physical injury at the time of an accident or other traumatic event is not at risk of developing future physical injuries as a consequence of that event. His only possible claim is for emotional distress. In contrast, in asbestos exposure cases, a plaintiff may develop one or more asbestos-related injuries years after exposure. Under this Court's prior FELA decisions, if permitted to sue for emotional distress based on exposure alone, a plaintiff would be barred from a second suit if he should later develop an asbestos-related disease. *Cf. Jackson*, 781 F.2d at 410-12 (under "single recovery" rule, a plaintiff suffering from one asbestos-related disease, such as asbestosis, may sue only once and must recover in that one suit damages for both his present disease and any other

ailment that he is more likely than not to develop in the future); *Burns*, 752 P.2d at 31 (rejecting claim for emotional distress based on asbestos exposure, stating "[a]llowing plaintiffs to sue for injuries when the disease is still subclinical would be an abrogation of the discovery rule in asbestos cases and mandate the commencement of a suit as soon as the contact with the asbestos fiber occurs, hardly a desirable result").

Although a number of jurisdictions have adopted a "separate disease" rule providing that asbestosis and cancer each constitute a separate cause of action even though arising from the same exposure to asbestos, *see, e.g., Eagle-Picher*, 481 So. 2d at 520,[11] no court has permitted claim-splitting that would allow emotional distress claims to be pursued separate and apart from physical injury claims. Moreover, as United States District Judge Spencer Williams observed in holding that emotional distress claims based on asbestos exposure without physical injury are not cognizable under Hawaii law,

> [a] consideration of when the statute of limitations would begin to run for emotional damages without underlying compensable harm provides further support for requiring such harm. Without a triggering event, a plaintiff could arbitrarily choose a date on which that plaintiff claims he or she could not adequately cope with fear of cancer. This possibility seriously undermines the policy that at some point in time the law should not recognize a claim.

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[11] The rationale of these cases is that asbestosis and cancer are independent disease entities -- i.e., that cancer does not develop from asbestosis; rather it is an entirely separate and discrete disease. *Id.* at 522.

> Conversely, defendants could gather evidence that plaintiffs knew or should have known at a time convenient for the defendants that plaintiffs' prior history of asbestos exposure might lead to cancer. . . . A regime of recovery for emotional distress not anchored to an underlying compensable harm presents boundless headaches in adjudicating statute of limitations problems.

In re Hawaii Fed. Asbestos Cases, 734 F. Supp. at 1570.

Clearly, the better rule in asbestos cases is that adopted by the overwhelming majority of courts, namely to restrict recovery for emotional distress to plaintiffs with actual physical injury caused by asbestos exposure.[12] The Second Circuit's rejection of that better rule in this case impermissibly diverges from the great bulk of authority under the common law and FELA. Moreover, the Second Circuit's decision conflicts with the fundamental policy considerations articulated by this Court in *Gottshall* and opens the courtroom door to tens of thousands (perhaps hundreds of thousands) of asymptomatic plaintiffs who have been exposed to asbestos or other potentially hazardous substances.

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[12] The cases relied on by the Second Circuit do not support abandoning the physical injury requirement: *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 316-17 (5th Cir. 1986) (plaintiff suffered dizziness, leg cramps, and a stinging sensation in his extremities, which court found to be physical injuries); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478 (Ohio Ct. C.P. 1987) (plaintiff had a physical injury -- asbestosis).

II. THE SECOND CIRCUIT MISINTERPRETED AND MISAPPLIED THE ZONE OF DANGER TEST ARTICULATED BY THIS COURT IN *GOTTSHALL*

A. The Second Circuit Erroneously Abandoned All the Traditional Elements of the Zone of Danger Test

Instead of adhering to the physical injury requirement set forth for asbestos cases in *Schweitzer*, the Second Circuit incorrectly ruled that plaintiff's exposure to asbestos met the zone of danger test, which this Court adopted in *Gottshall*. To reach this result, the Second Circuit abandoned all of the traditional requirements of the zone of danger test, namely, (i) an accident, near accident or other traumatic event, which (ii) subjects the plaintiff to a risk of *imminent* physical harm, (iii) causing fright and resultant emotional injury. The Second Circuit's ruling is fundamentally inconsistent with and impermissible under this Court's decision in *Gottshall*.

In *Gottshall*, this Court determined that purely emotional distress is compensable under FELA only if it falls under the common law "zone of danger" test. 512 U.S. at 556. Under the zone of danger test, "a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." *Id.* This test, which provides an exception to the general common law rule allowing recovery for emotional distress only where the plaintiff has suffered a physical injury, arose in response to a special category of cases involving accidents and near accidents in which a plaintiff suffered fright and severe emotional distress. As courts recognized, the general rule arbitrarily denied recovery to a physically uninjured plaintiff while permitting the slightly injured plaintiff standing next to him to recover, even though the two had

suffered the same fright and resultant emotional harm in a traumatic event. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules,* 34 U. Fla. L. Rev. 477, 488 (1982). Thus, the zone of danger test is based on the "realization that 'a near miss may be as frightening as a direct hit.'" *Gottshall*, 512 U.S. at 547 (quoting Pearson, *supra*, at 488).

Courts have, however, defined specific boundaries to emotional distress claims under the zone of danger test so that every person who was ever frightened or claimed that his workplace was generally hazardous would not have a cause of action. The requirement that a plaintiff be within the zone of danger of imminent physical harm is ineluctably linked to recovery under the test; without such a risk of immediate harm, there can be no zone of danger.

The zone of danger cases which this Court cited in *Gottshall* make clear that the risk of imminent physical injury is an essential and defining element of the zone of danger test. The cases cited by this Court all involve collisions or near collisions of trains, streetcars and carriages, or other sudden, traumatic events that caused fright, with resultant mental injury, to the plaintiffs. *See Gottshall*, 512 U.S. at 547 & n.8. For example, in *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034 (Minn. 1892), after a near collision of streetcars, a pregnant passenger was allowed to recover for fright and physical injuries resulting from fright. As the court explained,

> a *collision* seemed so *imminent*, and was so nearly caused, that the incident and attending confusion of ringing alarm-bells and passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of *immediate* death or great bodily injury, and

> that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness.

Id. at 1034 (emphasis added). Similarly, in *Mack v. South-Bound R. Co.*, 29 S.E. 905, 906 (S.C. 1898), the court allowed a plaintiff to recover who "just barely escaped being struck by the locomotive and cars, and . . . owing to the great and imminent danger . . . was terribly frightened, his nervous system was shocked, his mind was affected and partially destroyed, his reason unbalanced, and he, for a long time, was made ill and sick and suffered great mental anguish and physical pain."[13]

Nor have more recent cases expanded the boundaries of the zone of danger test. Such cases allow recovery only for fright and attendant emotional distress caused by danger of immediate physical injury from an accident or other

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[13] The other early cases cited by this Court in *Gottshall*, 512 U.S. 547 n.8, involve similar circumstances: *Simone v. Rhode Island Co.*, 66 A. 202, (R.I. 1907) (streetcar collision caused plaintiff fright resulting in fainting, vomiting, insomnia, headache, physical pain, three months in bed, and nervous disorders and weakness up to time of trial); *Kimberley v. Howland*, 55 S.E. 778 (N.C. 1906) (blasting sent rock crashing through plaintiff's house, causing plaintiff fright, shock, near miscarriage, and nervous physical pain and suffering); *Gulf, C. & S. F. Ry. Co. v. Hayter*, 54 S.W. 944 (Tex. 1900) (plaintiff in train collision could recover for fright and shock resulting in physical injury); *Pankopf v. Hinkley*, 123 N.W. 625 (Wis. 1909) (collision between car and horse-drawn carriage caused plaintiff severe fright and shock, and resultant miscarriage, severe pain and permanent injury to health); *Stewart v. Arkansas S. R. Co.*, 36 So. 676 (La. 1904) (fright from train accident resulted in plaintiff's miscarriage and subsequent ill health); *Watson v. Dilts*, 89 N.W. 1068 (Iowa 1902) (plaintiff suffered shock, fright, apprehension for her own life, prostration, nervous paralysis, and great mental and physical pain when defendant broke into home and assaulted husband).

sudden, traumatic event. For example, in *Robb v. Pennsylvania Railroad Co.*, 210 A.2d 709, 714 (Del. 1965), cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, the Delaware Supreme Court adopted the zone of danger test to permit recovery for fright and emotional distress in a case where a plaintiff fled uninjured from her car seconds before the car was hit by a train.[14]

So, too, in FELA cases both before and after this Court's decision in *Gottshall*, the zone of danger test has been restricted to claims arising out of sudden accidents or other traumatic events that present a danger of immediate physical injury, causing fright and severe emotional distress. For example, in *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994), the court held that, under FELA and *Gottshall*, the zone of danger concept requires that plaintiff "was subject to a reasonable fear of *immediate* personal injury" (emphasis added). Accordingly, the plaintiff was not in a zone of danger by virtue of the proximity of a worker who had on occasion

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[14] Also cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, were *Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (*en banc*) (car accident); *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (*en banc*) (explosion); *Rickey v. Chicago Transit Authority*, 457 N.E.2d 1 (Ill. 1983) (escalator accident); *Bovsun v. Sanperi*, 461 N.E.2d 843 (N.Y. 1984) (automobile accidents); *Garrett v. City of New Berlin*, 362 N.W.2d 137 (Wis. 1985) (plaintiff in a group of children chased by police car). Conversely, the other recent zone of danger cases cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, disallow recovery where the plaintiff was not at risk of, and did not fear, immediate physical injury: *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990) (*en banc*); *Resavage v. Davies*, 86 A.2d 879 (Md. 1952); *Stadler v. Cross*, 295 N.W.2d 552 (Minn. 1980); *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990) (*en banc*); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (N.D. 1972); *Shelton v. Russell Pipe & Foundry Co.*, 570 S.W.2d 861 (Tenn. 1978); *Boucher v. Dixie Medical Ctr.*, 850 P.2d 1179 (Utah 1992); *Jobin v. McQuillen*, 609 A.2d 990 (Vt. 1992).

punched other workers. The court emphasized that the "threat of injury" to the plaintiff (as is the case for plaintiff here) "was not immediate," but rather was "both speculative and remote." *Id.* at 434; *see also Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776, 779, 783 (Ohio 1995) (plaintiff was in zone of danger because he was threatened with a chipping hammer and nearly run over with a truck by fellow employees, and thus placed in risk of immediate harm), *cert. denied*, 116 S. Ct. 776 (1996); *Grube v. Union Pac. R.R. Co.*, 886 P.2d 845, 851 (Kan. 1994) ("fear for one's safety is an essential element of the zone of danger test and must be expressed at or near the time of the danger"); *Garcia v. Burlington N. R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is at 'immediate risk of physical harm'") (citation omitted).[15]

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[15] *See also Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 78 (3d Cir. 1991) (railroad worker a mile away from train collision could not recover under FELA for fright and emotional distress); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1024-25 (7th Cir. 1989) (no emotional distress recovery under FELA for plaintiff who attempted to rescue co-worker but was not himself at high risk of physical injury in accident and did not fear for his own safety); *Wilson v. Consolidated Rail Corp.*, 810 F. Supp. 411, 416-17 (N.D.N.Y. 1993) (in pre-*Gottshall* FELA case, applying zone of danger test and requiring "traumatic event" that put plaintiff in fear for his personal safety); *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436, 442 (E.D. La. 1993) (Jones Act) (stating "claimant must have been objectively within a zone of danger, he must have feared at the time of the incident that his life or person was in danger"); *Crooks v. Metro-North Commuter R.R. Co.*, No. 93 Civ. 6030, 1994 WL 719683, at *2 (S.D.N.Y. Dec. 28, 1994) (working alone on tracks was not within "'zone of danger' of an imminent physical injury" as required under *Gottshall*); *Bianco v. Philadelphia, Bethlehem & New England R.R. Co.*, No. CIV. A. 93-4828, 1995 WL 89036, at *1, *3-4 (E.D. Pa. Mar. 2, 1995) (under *Gottshall*, no emotional distress recovery for plaintiff who refused to undergo training to drive locomotive, alleging that if he had ever driven a locomo-

Contrary to the Second Circuit's holding, the zone of danger test simply does not apply to this fear of disease case. Plaintiff is not complaining about a "near miss" accident or other traumatic event that he witnessed or experienced. Nor does plaintiff allege that his workplace exposure to asbestos placed him in danger of immediate personal injury or that he suffered fright. On the contrary, by its very terms, plaintiff's claim urges the antithesis of a risk of immediate harm: he bases his claim on an alleged risk of injury that may occur at some indefinite time in the future. As such, plaintiff's claim falls well outside the boundaries of the "zone of danger" test.

Indeed, not only is the Second Circuit alone in applying the zone of danger test in asbestos litigation, but other courts have expressly declined to do so. As the court in *Nutt v. A.C. & S., Inc.*, 466 A.2d 18 (Del. Super. Ct. 1983), *aff'd*, 480 A.2d 647 (Del. 1984), stated, because "[c]linical symptoms may not be observable until after many years of exposure, and disability may progress even after exposure has ceased . . . [t]he nature of the asbestos related injury, whether considered on an exposure or a manifestation basis, is clearly incompatible with the traumatic event requirement for recovery of mental anguish under [the zone of danger test]." 466 A.2d at 25; *see also Wisniewski*, 759 F.2d at 273-74 (rejecting argument of uninjured plaintiffs exposed to asbestos that zone of danger test allowed recovery for emotional distress).

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tive, railroad's inadequate training would have placed him in a zone of danger); *Dziegelewski v. Consolidated Rail Corp.*, No. 93 Civ. 2666, 1995 WL 63155 at *1-2, *3 (S.D.N.Y. Feb. 15, 1995) (allegations that supervisor angrily threw keys onto plaintiff's desk and forced plaintiff to drive when "exhausted," that malfunctioning septic tank caused unpleasant odors in workplace, and that defendant's cabooses were generally unsafe did not meet the zone of danger test).

Similarly, the Fifth Circuit rejected a plaintiff's argument that recovery for mental anguish allegedly caused by asbestos exposure was permitted under Louisiana's "ordeal" rule, a threshold standard for emotional distress claims that is essentially equivalent to the zone of danger test.[16] *See Adams*, 783 F.2d at 592-93. The Fifth Circuit explained that while the Louisiana cases "allowed recovery for mental anguish engendered by a proven traumatic ordeal which did not result in physical injury," such cases did not recognize any right of recovery for mental anguish arising from fear of future complications from asbestos exposure where plaintiff had not proved that he had sustained any present injury from such exposure. *Id.* at 593; *cf. Simmons*, 674 A.2d at 238 (disallowing recovery for emotional distress based on asbestos exposure in the absence of physical injury, stating that near-miss accident cases "are not analogous" to asbestos exposure cases where "no physical injury to any party has been established").[17]

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[16] In near-miss accident and other traumatic event cases, Louisiana's "ordeal" rule permits an uninjured plaintiff to recover for fright and mental anguish. *See Adams*, 783 F.2d at 593 (citing, *e.g., Carroll v. State Farm Ins. Co.*, 427 So. 2d 24 (La. Ct. App. 1983) (permitting recovery for mental anguish suffered by uninjured plaintiff who narrowly missed being struck by a motorboat that collided into the dock where she was sitting)).

[17] The Second Circuit erroneously analogized this case to *Marchica v. Long Island Railroad Co.*, 31 F. 3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995), a fear of AIDS case. In *Marchica*, the plaintiff was in fact in a zone of danger of immediate physical injury and felt contemporaneous fear of immediate physical injury -- infection with the AIDS virus which, once contracted, is nearly always fatal. Moreover, the plaintiff had been "stabbed" by a hypodermic needle, a coworker saw blood coming from the plaintiff's "puncture wound," 31 F. 3d at 1200, and the plaintiff's "emotional distress was the direct result of a *documented physical injury*." *Id.* at 1204 (emphasis added); *see also Murphy v. Abbott Labs.*, 930 F. Supp. 1083, 1086-87 (E.D. Pa.

In sum, the zone of danger test requires presence in the zone of imminent physical harm as a precondition to recovery for fright and emotional distress. Under the prevailing principles of law articulated in *Gottshall* and other cases, the zone of danger test does not permit recovery for alleged emotional distress or fear of future disease caused by mere exposure to asbestos.

B. The Second Circuit Improperly Applied the Physical Impact Test

The Second Circuit's decision to permit recovery turns upon its determination that plaintiff suffered a "physical impact," namely, exposure to asbestos. (JA 640) In ruling that plaintiff could recover on this basis, the Second Circuit incorrectly treats physical impact as a basis for recovery separate and apart from the requirement that plaintiff have been within the zone of danger.

The Second Circuit's error derives from its misunderstanding of certain language in *Gottshall* describing the zone of danger test as "limit[ing] recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 512 U.S. at 547-48. With respect to the zone of danger requirement, this is not, as the Second Circuit appears to have concluded, a disjunctive test; on the contrary, in the very next sentence, this Court explained precisely what it meant: "That is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" *Id.* at 548 (citation omitted).

Indeed, because "[w]hether the plaintiff has suffered an impact bears little relationship to the [emotional] harm,"

1996) (distinguishing fear of AIDS cases, where persons stuck by needles sustain physical injury, from asbestos exposure cases).

see Pearson, *supra*, at 488, the zone of danger test treats impacted and unimpacted plaintiffs alike: both must be in the zone of danger of immediate physical injury to recover. Thus, there exists no separate test under *Gottshall* which permits a FELA plaintiff to recover for negligent infliction of emotional distress whenever that plaintiff can demonstrate some sort of "physical impact," regardless of whether that plaintiff is in the zone of danger.

In fact, such an impact test was one of the "[t]hree major limiting tests for evaluating claims alleging negligent infliction of emotional distress" that this Court considered in *Gottshall*. *See* 512 U.S. at 546-47. This Court expressly declined to adopt such a test, rejecting it in favor of the zone of danger test. *See id.* at 556. This Court determined that the zone of danger test, with its requirement of a risk of imminent physical harm, was most "consistent with FELA's central focus on physical perils." *See id.* at 555 ("FELA was intended to provide compensation for the injuries and deaths caused by the *physical* dangers of railroad work") (emphasis added). The view of the Second Circuit and plaintiff that the zone of danger test adopted by this Court in *Gottshall* somehow subsumes a physical impact test is not supported by the language or logic of the decision, nor by the myriad cases applying the zone of danger test under the common law. These cases simply do not interpret the zone of danger test as incorporating a separate physical impact test that permits plaintiffs who were not threatened with immediate harm to recover.[18]

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[18] Moreover, even jurisdictions still following the physical impact test (as opposed to the zone of danger test) have placed special limitations on recovery for emotional distress based on exposure to asbestos that are not satisfied by the present case. For instance, although a Florida appellate court found that exposure to asbestos constituted a physical impact, the court established a special rule in asbestos cases requiring the presence of actual asbestos-related disease as a prerequisite to re-

Interpreting the zone of danger test, as the Second Circuit has done, to include a separate impact test that has nothing to do with the zone of danger and the concomitant risk of imminent harm would give rise to the absurd and much criticized results that have led many jurisdictions to abandon the old "physical impact" test. *See, e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 363-65 (5th ed. 1984) (noting the expansion of the meaning of the "impact" test and observing: "The magic formula 'impact' is pronounced; the door opens to the full joy of a complete recovery.") (citation omitted). Although early cases under the old impact rule required a physical injury caused by an impact, *see, e.g., Boston v. Chesapeake & O. Ry. Co.*, 61 N.E.2d 326, 327 (Ind. 1945), gradually the impact rule was relaxed, as courts struggled to find a way to allow recovery in cases where an uninjured plaintiff had suffered great fright and emotional trauma from a near-miss accident. *See Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994). However, the basic flaw remained under the impact test that a near-miss plaintiff who had suffered no physical injury and no physical impact, but had suffered debilitating fright, shock and emotional distress, was not allowed to recover. *See, e.g. Rossi*, 210 A.2d at 714. Thus, the impact test was a partial and imperfect solution to the problem of the near-miss plaintiff.

In some jurisdictions, the impact rule was further diluted to allow recovery in cases where there had been an impact of any kind however slight, regardless of whether there had

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covery for emotional distress. *See Eagle-Picher*, 481 So. 2d at 527-28. As the court in *Eagle-Picher* pointed out, the special physical injury requirement in exposure cases is "necessary and fair." *Id.* at 528. Millions of people have been exposed to asbestos and other harmful substances. Permitting a cause of action for emotional distress on the basis of "impact" (*i.e.*, exposure) alone would result in unlimited liability for defendants as well as an immense burden on the courts. *See id.*

been an accident, a near accident, or a zone of danger. Finally, as Professors Prosser and Keeton observe, "[a] Georgia circus case reduced the matter to something of an absurdity by finding 'impact' where the defendant's horse 'evacuated his bowels' into the plaintiff's lap." Keeton, *supra*, at 364 (citation omitted). This is *not* the rule that this Court adopted in *Gottshall*. Rather, the zone of danger test, as adopted in *Gottshall*, removes the rationale for the diluted and arbitrary "physical impact" test by allowing both impacted and unimpacted plaintiffs to recover for emotional distress provided their distress arose from fright caused by the threat of imminent physical harm while in the zone of danger. *See Bloom*, 41 F.3d at 916 n.6.

Moreover, the zone of danger test did not grow out of the physical impact test, but rather developed as a separate and better approach to the problem of the near-miss plaintiff -- one that did not restrict recovery based on the fortuity of whether or not some impact occurred. The early zone of danger cases allowed near-miss plaintiffs to recover not for emotional distress *per se*, but for physical injuries (*e.g.*, a miscarriage) caused by fright and emotional distress. *See, e.g., Purcell*, 50 N.W. at 1034. The analytical hurdle that the courts perceived in these early cases had to do with indirect causation -- fright, not a direct physical force, being the cause of the plaintiff's physical injury. *See id.* at 1035; *Stewart*, 36 So. at 677. In adopting the zone of danger test, these courts reasoned that a defendant's negligence could be a proximate cause of a plaintiff's physical injury even though there was an intervening link -- fright and shock -- in the chain of causation. *See Purcell*, 50 N.W. at 1035; *Stewart*, 36 So. at 677-78. The final step in the development of the zone of danger jurisprudence was to recognize severe emotional distress itself as a compensable injury if the plaintiff was in the zone of danger, with the physical consequences of the

plaintiff's emotional distress serving to guarantee the genuineness of the distress. *See, e.g., Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp. 403, 406-07 (S.D. Fla. 1995) (permitting recovery for emotional distress under the zone of danger test while requiring physical manifestation to guarantee genuineness).

Thus, the zone of danger test developed not as an outgrowth of the physical impact test, but as a distinct approach, with its own coherent logic, to the problem of the near-miss plaintiff. Under that approach, there is no reason to incorporate a separate "physical impact" test, and in fact nothing in the early or more recent decisions that set forth the zone of danger test suggests in any way that a separate "physical impact" test is contemplated under the zone of danger test. Indeed, in *Robb*, cited by this Court in *Gottshall*, 512 U.S. at 548 n.9, the Delaware Supreme Court, in adopting the zone of danger test, makes clear that the zone of danger test does not subsume a physical impact test. The court specifically criticizes the "token impact" required under the impact test, stating:

> If more were needed to warrant a declination to follow the [physical impact rule], reference to the fictional and mechanical ends to which the impact rule has been carried would suffice for the purpose. The most trivial bodily contact, itself causing little or no injury, has been considered sufficient . . . . Token impact sufficient to satisfy the rule has been held to be a slight bump against the seat, dust in the eyes, inhalation of smoke, a trifling burn, *jostling* in an automobile, indeed any degree of physical impact, however slight.

Robb, 210 A.2d at 713-14 (citations omitted). Opining that the "impact rule 'is almost certainly destined for ultimate

extinction,'" the Delaware Supreme Court adopted the zone of danger test, holding that where negligence proximately causes fright, "one within the immediate area of physical danger from that negligence" is entitled to recover. *Id.* at 714-15. This rule, according to the court, is "the better rule, supported by reason, logic and fairness." *Id.* at 715.

In sum, the Second Circuit erroneously permitted plaintiff to recover for emotional distress for fear of future injury based on the "physical impact" test. Under the zone of danger test adopted by this Court in *Gottshall*, a plaintiff can recover for emotional distress only if he was in the zone of danger of imminent physical harm created by an accident or other traumatic event and so suffered fright and resultant emotional injury. These requirements are not met in this asbestos exposure case. Moreover, the policy reasons articulated by this Court in *Gottshall* also support a rule limiting recovery for emotional distress based on asbestos exposure to cases where the plaintiff has developed an asbestos-related disease or injury. The Second Circuit's decision to the contrary is an unsound and erroneous expansion of liability.

III. THE SECOND CIRCUIT, IN CONTRAVENTION OF *GOTTSHALL*'S MANDATE, DISCARDED WELL-ESTABLISHED COMMON LAW LIMITATIONS ON RECOVERY FOR EMOTIONAL DISTRESS

Not only did plaintiff fail to meet the requirements of the threshold zone of danger test, but his alleged distress also does not meet the further requirements that the common law imposes -- and the Second Circuit rejected -- to place rational limits on liability for negligent infliction of emotional distress. The Second Circuit discarded the widely accepted requirements that a plaintiff's emotional distress must result in a physical manifestation, be severe, and be substantiated by competent medical, psychiatric or clini-

cal evidence.[19] These requirements are necessary to establish that a plaintiff claiming emotional distress has actually suffered an injury, which is an essential element of any claim under FELA and the common law. *See Gottshall*, 512 U.S. at 542; *Schweitzer*, 758 F.2d at 942. The Second Circuit's abandonment of these limitations creates an unprecedented expansion of liability for negligent infliction of emotional distress, a result that is in direct conflict with this Court's mandate in *Gottshall* to preserve common law limitations on recovery for such claims. As this Court observed in *Gottshall*, "[o]ur FELA cases require that we look to the common law . . . , and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 512 U.S. at 557; *see also id.* at 544 (common law principles "must play a significant role" and "are entitled to great weight" in analysis of negligent infliction of emotional distress under FELA).

A. The Second Circuit Erred in Holding That No Physical Manifestation of Emotional Distress Is Required

The Second Circuit declined to require that plaintiff's alleged emotional distress manifest itself in physical symptoms. (JA 644) With this ruling, the Second Circuit contravened the "overwhelming weight of authority across the nation," which holds that to be compensable, emotional distress must result in "some physical manifestation." *Plummer v. Abbott Labs.*, 568 F. Supp. 920, 926-27 (D.R.I.

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[19] These issues were not, and need not have been, addressed in *Gottshall* because both plaintiffs clearly satisfied all three of these requirements. *See* 512 U.S. at 535-37, 539.

1983).[20] Indeed, as this Court observed in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, "[o]ne leading commentary states that '[i]n the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character.'" 480 U.S. 557, 569 n.18 (1987) (quoting Keeton, *supra*, at 64).

In *Gottshall*, this Court noted that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11. Moreover, as Justice Ginsburg recognized in her dissent, the adoption of a physical manifestation requirement is an important safeguard of the genuineness of emotional distress claims. *See id.* at 568-69 (Ginsburg, J., dissenting).

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[20] For other cases requiring physical manifestation of an alleged emotional injury, *see, e.g., Robb*, 210 A.2d at 714-715 (Del.); *Hatfield v. Max Rouse & Sons Northwest*, 606 P.2d 944, 955 (Idaho 1980); *Payton v. Abbott Labs*, 437 N.E.2d 171, 181 (Mass. 1982); *State ex rel. Woyke v. Tonka Corp.*, 420 N.W.2d 624, 627 (Minn. Ct. App. 1988); *Sears Roebuck & Co. v. Young*, 384 So. 2d 69, 71, 73 (Miss. 1980); *Corso v. Merrill*, 406 A.2d 300, 308 (N.H. 1979); *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965); *Melton v. Allen*, 580 P.2d 1019, 1021-22 (Or. 1978); *Reilly v. United States*, 547 A.2d 894, 896-97 (R.I. 1988); *Nelson v. WEB Water Dev. Ass'n*, 507 N.W.2d 691, 699 (S.D. 1993); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973); *Vaillancourt v. Medical Ctr. Hosp.*, 425 A.2d 92, 95 (Vt. 1980). Courts have also required physical manifestation in determining whether emotional injury is compensable under workers' compensation statutes. *See, e.g., Seitz v. L & R Indus., Inc.*, 437 A.2d 1345 (R.I. 1981) (psychic injury which neither results in nor is caused by physical injury is not compensable under Rhode Island worker's compensation statute).

The majority view that physical manifestation is required is also reflected in the Restatement (Second) of Torts, which states:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Restatement (Second) of Torts § 436A (1965).

Significantly, the requirement of physical illness or injury resulting from the plaintiff's fright was the prevailing rule at the time of FELA's enactment in 1908.[21] *Cf. Gottshall*, 512 U.S. at 554-55 (looking to "state of the common law in 1908, when FELA was enacted" and noting "historical pedigree" of zone of danger test). In addition, contrary to the Second Circuit, courts in recent cases have specifically required a physical manifestation of emotional distress under FELA. *See Williams*, 907 F. Supp. at 406-07 (applying *Gottshall* and requiring that emotional distress be accompanied by "physical manifestation" under FELA and Jones Act); *Amendola*, 699 F. Supp. at 1410 (pre-*Gottshall*, requiring asbestos plaintiff under FELA to show physical harm either causing or caused by emotional distress); *cf. Ellenwood v. Exxon Shipping Co.*, 795 F. Supp. 31, 34-35 (D. Me. 1992) (in light of FELA and Jones Act case law, requiring physical manifestation under

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[21] Thus, in all the early zone of danger cases cited by this Court in *Gottshall*, the plaintiff is described as having some physical illness or other physical injury resulting from his or her emotional distress. *See supra* at note 13 and accompanying text.

general maritime law), *aff'd in relevant part*, 984 F.2d 1270 (1st Cir.), *cert. denied*, 508 U.S. 981 (1993).

As these courts have recognized, the physical manifestation requirement furthers the fundamental policy concerns that this Court identified in *Gottshall* for imposing limitations on liability. *See Amendola*, 699 F. Supp. at 1411 (the physical manifestation test "will serve to limit trivial, frivolous, or premature claims" under FELA). The Restatement also emphasizes these policy concerns:

> [E]motional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial . . . . It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants.

Restatement (Second) of Torts § 436A cmt. b (1965).

In sum, absent a requirement of physical manifestation, a defendant's liability for claims of emotional distress under FELA would be unpredictable and nearly infinite -- the very result the common law limitations on emotional distress claims were designed to avoid. *See Gottshall*, 512 U.S. at 551-52.

B. The Second Circuit Incorrectly Held That Emotional Distress Is Compensable Even If It Is Not Severe

The Second Circuit also departed from well-settled common law principles in holding that plaintiff could recover for emotional distress that, as the Second Circuit acknowledged, was not severe. (JA 647) Contrary to the Second Circuit's holding, courts have overwhelmingly ruled that there can be no recovery for the negligent infliction of

emotional distress if the distress is not severe. As this Court observed in *Buell*, 480 U.S. at 567 n.13, "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *See also Roberts v. Saylor*, 637 P.2d 1175, 1180 (Kan. 1981) ("it is only when emotional distress is extreme that possible liability arises"); *Parkway*, 901 S.W.2d at 444 (requiring a "high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment or anger");[22] *cf.* Keeton, *supra*, at 364-65 (even the "handful of courts" that have relaxed the physical manifestation rule require "serious emotional distress"). In fact, Metro-North has found no case that supports the Second Circuit's claim that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact."[23] (JA 647)

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[22] *Accord Parrish v. Omaha Pub. Power Dist.*, 496 N.W.2d 914, 915 (Neb. 1993) (requiring emotional distress "so severe that no reasonable person could have been expected to endure" it); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 97 (N.C. 1990) (requiring severe emotional distress defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia or any other type of severe and disabling emotional or mental condition"); *see also Williams v. Baker*, 572 A.2d at 1068 (D.C.); *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981); *Robertson v. Geophysical Serv., Inc.*, 469 So. 2d 22, 24 (La. Ct. App. 1985); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433, 437 (Me. 1982); *K.A.C. v. Benson*, 527 N.W.2d 553, 559 (Minn. 1995); *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chems. Co.*, 578 A.2d 1248, 1250 (N.J. Super. Ct. App. Div. 1990); *Muchow v. Lindblad*, 435 N.W.2d 918, 923 (N.D. 1989); *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 442-43 & n.23 (Wis. 1994).

[23] The Second Circuit's reliance on two trial court decisions (JA 647) is misplaced. *Lacy v. Cooper Hospital/University Medical Center*, 745 F. Supp. 1029, 1035 (D.N.J. 1990), does not discuss physical impact or distinguish between severe and non-severe emotional distress, but rather applies a longstanding exception to the threshold physical injury requirement in cases where a corpse has been mishandled. *See* Keeton, *supra*, at 362. *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 478 (Ohio Ct. C.P. 1987), involved a plaintiff who had an actual physical injury (asbestosis). Moreover, Restatement (Second) of Torts § 436A, cited by the Second Circuit, requires physical harm, not merely physical impact.

Numerous courts and commentators have noted that the severity requirement serves not only to guarantee the genuineness of emotional distress claims, but also to limit the variability and unpredictability of awards for emotional distress and the unlimited liability that would result if relatively trivial emotional distress were compensable. *See, e.g., Parkway*, 901 S.W.2d at 443-44. Moreover, like the physical manifestation requirement, the severity requirement accords with the purposes of FELA. As this Court observed in *Gottshall*, the basic rationale for finding that emotional injury is an injury within the meaning of Section 1 of FELA was the recognition that "severe emotional injuries can be just as debilitating as physical injuries." 512 U.S. at 550. It is within the purpose of the statute to compensate such injuries; it is not within the purpose of the statute to compensate non-severe emotional distress of the kind alleged by plaintiff in this case.

Indeed, the Second Circuit appears to have been motivated throughout its opinion by the desire to punish Metro-North for its negligent conduct rather than to compensate plaintiff. The Second Circuit acknowledged that the plaintiff has no physical injury, can offer no evidence of clinical disease, and does not allege severe emotional distress. (JA 641-42; JA 647;) Under long established principles of the law of negligence, there is no injury, emotional or physical, in this case to compensate. By permitting such a case to go to a jury, the Second Circuit has abdicated the courts' traditional function of screening legally meritless

claims and invited the jury improperly to focus on the defendant's negligent behavior and impose a penalty.

C. The Second Circuit Erred by Not Requiring Medical or Psychiatric Evidence of Emotional Distress

The Second Circuit overturned the trial court's finding that plaintiff presented no objective evidence of his emotional distress. (JA 646-47) To reach this result, the Second Circuit departed from the well-established common law rule imposing upon plaintiffs the burden of presenting some objective medical, psychiatric or clinical evidence of alleged emotional distress.[24]

The rationale for this basic evidentiary requirement is similar to the policy considerations discussed above which underlie the other common law requirements for negligent infliction of emotional distress. In particular, courts have observed that the requirement of medically provable and diagnosable mental distress defines an appropriate middle ground of liability, between the "Scylla of unlimited liabili-

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[24] *See, e.g., Aurora v. Burlington N. R.R. Co.*, 31 F.3d 724, 726 (8th Cir. 1994) (Nebraska law) (requiring proof of "medically significant" emotional distress; testimony by psychiatrist that plaintiff was "anxious and depressed" but did not need medication or follow up treatment was insufficient as a matter of law); *accord Kadans v. Citicorp Mortgage, Inc.*, 26 F.3d 131 (9th Cir. 1994) (unpublished, table; text at 1994 WL 242112, at *1) (Nevada law); *Silver v. Mendel*, 894 F.2d. 598, 607 n.19 (3d Cir.) (Pennsylvania law), *cert. denied*, 496 U.S. 926 (1990); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1406 (W.D. Mo. 1994); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (*en banc*); *Parrish*, 496 N.W.2d at 915-16 (Neb.); *Kohn v. Schiappa*, 656 A.2d 1322, 1325 (N.J. Super. Ct. Law Div. 1995); *Leone v. Leewood Serv. Station, Inc.*, 624 N.Y.S.2d 610, 613 (App. Div.), *appeal denied*, 658 N.E.2d 221 (N.Y. 1995); *Muchow*, 435 N.W.2d at 923 (N.D.); *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 974-75 (Utah 1993).

ty" which would result from a "broad definition of 'emotional harm' -- one which includes upset, anger, and grief" -- and the "Charybdis of no liability" which would result from a requirement of permanent mental damage. *Bass v. Nooney Co.*, 646 S.W.2d 765, 773 n.4 (Mo. 1983) (*en banc*) (quoting Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. Chi. L. Rev. 512, 517 (1968)).

In this case, the evidence cited by the Second Circuit indisputably does not meet the common law standard of proof. Plaintiff presented *no* medical or psychiatric evidence of emotional distress. He never consulted a psychiatrist, social worker, or counselor, (JA 519-20), and his own expert testified that he did not display a level of concern warranting counseling. (JA 205-06; JA 624-25) Indeed, even the Second Circuit characterized the evidence it cited of plaintiff's emotional distress as "slim." (JA 647) That evidence consisted of complaints by Metro-North employees about working conditions and of plaintiff's own conclusory allegations of fear and anger. (JA 646-47) Such evidence does not constitute proof of emotional distress, much less the required objective medical or psychiatric proof.

There is no support in the common law to permit such a totally unverified claim of emotional distress to go to a jury. Moreover, under Section 1 of FELA, a compensable injury is a mandatory statutory element of a cognizable claim, and it is an element which plaintiff must prove. *See In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863, at *3. The Second Circuit has effectively removed the need not only for objective medical or psychiatric proof of emotional injury, but the need for any objective evidence whatso-

ever.[25] Under the Second Circuit's standard, a plaintiff's conclusory allegations of the most trivial and transitory distress will suffice to establish a compensable emotional injury. The Second Circuit's ruling is contrary to well-settled common law principles and common sense and warrants reversal by this Court.

IV. THE SECOND CIRCUIT ERRED IN ALLOWING AN ASYMPTOMATIC PLAINTIFF TO RECOVER MEDICAL MONITORING DAMAGES UNDER FELA

The Second Circuit determined that plaintiff's separate claim for medical monitoring damages was cognizable under FELA "despite the fact that he has yet to suffer an asbestos-related disease." (JA 649) With this holding, the Second Circuit took the radical step of reading FELA as permitting damages in the absence of any injury, in direct contravention of the statute's express injury requirement. Metro-North respectfully submits that the Second Circuit's ruling on medical monitoring is erroneous both as a matter of statutory construction and as matter of federal common law under FELA. Moreover, the Second Circuit's holding ignores compelling policy reasons why medical monitoring damages should not be granted in the absence of injury, policy reasons that affect not only the interests of defendants in being free from a potentially limitless and undefined liability, but also the interests of plaintiffs who have

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[25] In refusing to require objective medical, psychiatric or clinical evidence, the Second Circuit inappropriately relied on civil rights cases under 42 U.S.C. § 1983. In such civil rights cases, an independent constitutional tort, with an injury such as job discrimination or false imprisonment, serves as the basis for awarding emotional distress damages flowing from the tort. *See, e.g., Bolden v. Southeastern Pa. Trans. Auth.*, 21 F.3d 29, 34 (3d Cir. 1994) (citing *Carey v. Piphus*, 435 U.S. 247 (1978)); *Miner v. City of Glen Falls*, 999 F.2d 655, 662 (2d Cir. 1993). No such independent tort exists in this case.

a present physical injury in obtaining a speedy, just resolution of their claims.

A. FELA's Statutory Injury Requirement Forbids Medical Monitoring Damages in the Absence of Present Injury

Section 1 of FELA provides that railroad employees may sue their employers for "*injury* or death resulting in whole or in part from the negligence" of the railroad, its officers, employees and agents. 45 U.S.C. § 51 (emphasis added). In construing this statutory language, this Court has held that "injury" includes physical injuries from accidents, which were Congress's primary focus in enacting FELA in 1908, occupational diseases such as silicosis, and emotional injuries that meet the threshold standard of the zone of danger test. *See Gottshall*, 512 U.S. at 542-43, 556. In no case, however, has this Court or any other court -- except for the Second Circuit here -- extended FELA to allow damages for other than a present, existing injury.

In *Gottshall*, this Court set forth the analysis for deciding whether a category of claims involves an "injury" that is cognizable under FELA. First, a court "must look to FELA itself, its purposes and background, and the construction we have given it over the years." *Id.* at 541. Second, "because 'FELA jurisprudence gleans guidance from common-law developments,' [the court] must consider the common law's treatment of the right of recovery asserted by [the plaintiff]." *Id.* at 541-42 (citation omitted).

The Second Circuit, in its decision in this case, skipped the first step in the mandated analysis by failing to consider the words of the statute itself. Clearly, under the express terms of FELA, there can be no recovery unless the plaintiff has suffered an "injury" within the meaning of section 1. Rather than addressing the statutory language,

however, the Second Circuit merely commented that "[i]t is hornbook law that a plaintiff may recover reasonable past and future medical expenses *incurred as a result of an injury*." (JA 648 emphasis added)

The proposition cited by the Second Circuit is unexceptionable. But it does not support what the Second Circuit has done, namely to treat a claim for medical monitoring as a separate cause of action in and of itself, rather than as damages that may be awarded upon the plaintiff's establishing a compensable injury. As the Fourth Circuit explained in *Ball*, 958 F.2d at 39, "[a] claim for medical surveillance costs is simply a claim for future damages."[26] The Fourth Circuit observed that "such relief is only available where a plaintiff has sustained a physical injury that was proximately caused by the defendant." *Id.* Therefore, in *Ball*, the court rejected the plaintiffs' claim for medical monitoring because they "ha[d] not demonstrated that they are suffering from a present, physical injury that would entitle them to recover medical surveillance costs." *Id.*

FELA's statutory injury requirement clearly mandates the application of these same principles that were relied upon by the court in *Ball*. In its decision, the Second Circuit ignored the dispositive fact that, under the applicable caselaw of this Court, plaintiff in this case suffered no "injury" that could serve as the statutory -- and factual -- basis for his claim under FELA for medical monitoring damages. In *Urie*, 337 U.S. at 170, this Court held that under FELA

[26] Similarly, the hornbook relied on by the Second Circuit recognizes medical monitoring costs as a type of damages that flow from a personal injury. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 90, at 323-24 (1935); *accord, e.g.*, 1 Jacob A. Stein, *Stein on Personal Injury Damages* § 5.18, at 247 (2d ed. 1991); *Thomas*, 846 F. Supp. at 1410; *Purjet v. Hess Oil Virgin Islands Corp.*, Civ. No. 1985/284, 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1986).

a worker exposed to a potentially harmful substance is not "injured," and thus may not be deemed to have a cause of action, until and unless "the accumulated effects of the deleterious substance manifest themselves." *See also Schweitzer*, 758 F.2d at 942. Here, the accumulated effects, if any, of plaintiff's asbestos exposure have not manifested themselves in any way; indeed, plaintiff is totally asymptomatic. X-rays of plaintiff's lungs show no pleural plaques or thickening and no traces or effects whatsoever of asbestos exposure (JA 73-74); his pulmonary function tests are normal. (JA 73-74)

Indeed, even where a plaintiff has pleural thickening or scarring, courts have held that, unless actual impairment is present, such scarring and thickening are mere changes or alterations that do not constitute a compensable physical injury. *See, e.g., Owens-Illinois v. Armstrong*, 591 A.2d 544, 561 (Md. Ct. Spec. App. 1991), *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md.), *cert denied*, 506 U.S. 871 (1992); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1567; *see also Restatement (Second) of Torts* §§ 15, 7 cmt. b (1965) (physical injury requires impairment, pain or illness; it "implies a loss or detriment to a person, and not a mere change or alteration"); *Schweitzer*, 758 F.2d at 942 (subclinical changes from asbestos exposure do not constitute the "actual loss or damage . . . required to sustain a cause of action under generally applicable principles of tort law").[27] Under these well-reasoned authorities, it is evident that plaintiff here suffers from no cognizable injury to support medical monitoring damages

[27] *Accord, e.g., Bernier*, 516 A.2d at 543; In re Asbestos Prods., 1996 WL 239863, at *3; *Caputo v. Boston Edison Co.*, CIV. A. No. 88-2126-Z, 1990 WL 98694, at *3-4 (D. Mass. July 9, 1990), *aff'd*, 924 F.2d 11 (1st Cir. 1991); *Batko*, 1986 WL 5761, at *1; *Hayes v. ACandS, Inc.*, 95 CH 1835, slip op. at 13 (Ill. Cir. Ct. Oct. 30, 1996).

under FELA. *See Batko*, 1986 WL 5761, at *1, *3 (denying claims for future medical costs under FELA where plaintiffs had been exposed to asbestos but had no injury).

Such a construction of FELA, denying medical monitoring in the absence of an existing physical injury, is supported by case law interpreting analogous language in other statutes. For example, in *Ball*, the court concluded that exposure to a toxic chemical, without resulting disease or injury, is not a compensable "injury" under two states' worker's compensation statutes. Thus, plaintiffs had no viable medical monitoring claim under those statutes. 755 F. Supp. at 1371.[28]

Moreover, even if one assumes *arguendo* that plaintiff in this case suffered an emotional injury compensable under FELA, the medical monitoring damages plaintiff seeks to recover have no factual nexus to that injury. Plaintiff is not seeking medical monitoring of his mental or emotional state. Rather, his medical monitoring claim relates to the possibility that he may later develop an asbestos-related injury. Plaintiff's own expert testified that plaintiff has no

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[28] None of the medical monitoring cases cited by the Second Circuit arises under FELA or any other statute imposing a comparable "injury" requirement. Moreover, the validity of the prediction in the Third Circuit's decisions in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991), and 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995), that Pennsylvania common law would allow medical monitoring damages in the absence of physical injury has been severely undermined. Recent federal district court decisions read *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), "as holding that mere exposure to significant levels of asbestos, without a demonstrable physical consequence such as pleural thickening, does not support a claim for medical monitoring." *Fried v. Sungard Recovery Servs. Inc.*, 936 F. Supp. 310, 311 (E.D. Pa. 1996); *see also Fried v. Sungard Recovery Servs. Inc.*, 925 F. Supp. 375, 376-77 (E.D. Pa. 1996).

discernible physical effects of asbestos exposure (JA 135), much less an actual asbestos-related physical "injury" which could serve as a basis for recovering medical monitoring damages. Therefore, the Second Circuit's ruling that plaintiff's claims for medical monitoring could go forward is plainly incorrect as a matter of statutory construction.

B. Plaintiff's Claim for Medical Monitoring Damages Is Contrary to Settled Common Law Principles and Public Policy

Not only did the Second Circuit fail to address FELA's statutory language in allowing this uninjured plaintiff to recover medical monitoring damages, but it also failed to adhere to well established common law principles, as mandated in *Gottshall*, 512 U.S. at 554-55. In its analysis, the Second Circuit failed to acknowledge the fact that a claim for medical monitoring costs where a plaintiff has suffered no present physical injury is a novel theory of damages that is contrary to traditional common law principles and, indeed, has been recognized in only a small minority of jurisdictions. The traditional tort law of negligence conditions recovery of damages on an existing injury. *See* Restatement (Second) of Torts § 902 & cmt. a (1965) ("Damages flow from an injury."). Actual injury is required for a negligence cause of action; the "threat of future harm, not yet realized, is not enough." Keeton, *supra*, at 165. Indeed, courts have relied on this principle in dismissing medical monitoring claims based on exposure to asbestos or other potentially harmful substances, where (as here) there is no present injury or disease. For example, in *Purjet*, the court held that "[s]uch relief is . . . appropriate only when a demonstrable *injury* caused by a negligent act increases the possibility of developing ailments in the future." 1986 WL 1200, at *4 (emphasis added); *accord, e.g.*, *Ball*, 958 F.2d at 39; *Thomas*, 846 F. Supp. at 1410; *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL

312969, at *51-52 (W.D.N.C. Oct. 29, 1990); *Hayes*, slip op. at 13 (citing *Schweitzer* and *Betts v. Manville Personal Injury Settlement Trust*, 588 N.E.2d 1193, 1217 (Ill. Ct. App. 1992)). It is the departure from this basic principle that has made medical monitoring claims in the absence of injury "one of the most controversial topics in tort law today." Terry Christovich Gay & Paige Freeman Rosato, *Combatting Fear of Future Injury and Medical Monitoring Claims*, 61 Def. Couns. J. 554, 557 (1994).

In construing FELA, this Court has gleaned guidance from the common law, in particular, from the status of a particular class of claims under the common law at the time of FELA's enactment. Thus, the Court has considered the "historical pedigree" of a claim in determining whether a claim is cognizable under FELA. *See Gottshall*, 512 U.S. at 554-55 (examining "state of the common law in 1908, when FELA was enacted" and emphasizing "historical pedigree" of zone of danger test). Plaintiff's claim for medical monitoring damages in the absence of any present physical injury is completely lacking in the historical pedigree that could potentially bring it within the intent of Congress in enacting FELA.

In embracing this novel claim, the Second Circuit disregarded the fundamental policy considerations for limiting liability identified by this Court in *Gottshall*. Such policy concerns have been at the heart of decisions denying recovery under state common law for medical monitoring in the absence of physical injury. As one court has observed:

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants.

Ball v. Joy Manufacturing Co., 755 F. Supp. 1344, 1372 S.D. W. Va 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991).

As the *Ball* court recognized, opening the courthouse door to uninjured plaintiffs seeking medical monitoring damages will consume scarce judicial resources, postponing and quite possibly precluding recovery for the injured. *See id.* ("Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs being remediless."). As Professor Schuck observes, "[a]s between the claims of the already impaired and the claims of those who are not now (and may never become) sick, . . . society should accord higher priority to the former." Schuck, *supra*, at 575-76.

In addition, "[w]hile the perception seems to be that [medical monitoring] damages are a relatively inexpensive means of addressing potential problems, the reality is that damages for medical surveillance costs can be staggering, especially in cases involving multiple plaintiffs." Eric W. Wiechmann, *Curse of the Unsick: Update on Latent Injury Claims in Toxic Tort Cases*, The Brief, Summer 1996 at 10, 44. As the court in *Ball* noted, "defendants' pockets or bank accounts do not contain infinite resources." *Ball*, 755 F. Supp. at 1372. "Some asbestos defendants may not possess enough money to pay present and, if trends continue, future claimants the current litigation value of their claims."[29] Schuck, *supra*, at 557. Thus, medical monitoring claims for the uninjured will be competing for the "same rapidly shrinking fund" available to compensate plaintiffs with actual physical injuries. *See id.*; Gay &

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[29] To date, at least sixteen companies have been forced into bankruptcy by the costs of asbestos litigation. *See* N.Y.L.J., Feb. 6, 1995, at 7.

Rosato, *supra*, at 563. Moreover, requiring employers governed by FELA to pay for future medical monitoring costs for every employee who stands even a remote chance of developing a workplace-related illness would improperly render employers virtual insurers of their workers' health. *See Gottshall*, 512 U.S. at 543 (FELA "does not make the employer the insurer of the safety of his employees").

Furthermore, according to Professor Schuck, evidence suggests that medical monitoring is not appropriate in the asbestos context -- "effective screening procedures are not yet available [for some asbestos conditions], and in others early detection does not improve the prospects of cure." Schuck, *supra*, at 576-77. Therefore, "it seems difficult to justify expending the diminishing resources available for compensation in this particular way." *Id.* at 577.

Ultimately, however, in this case, it is not up to the courts to resolve the policy questions raised by the medical monitoring claim asserted by this totally asymptomatic plaintiff. The statute is clear: such a claim is not permitted under FELA in the absence of a present injury. The courts may not rewrite the statute; it is up to Congress, if it desires to do so, to change the law to permit such a claim.

CONCLUSION

The Second Circuit's decision should be reversed and the directed verdict in favor of Metro-North reinstated.

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Supreme Court, U.S.
FILED
JAN 14 1997
CLERK

(25)

No. 96-320

In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

Given the policies informing the FELA and the common law, what is the appropriate standard for allowing railroad workers to recover for emotional distress due to negligently inflicted toxic exposure?

Given the policies informing the FELA and the common law, what is the appropriate standard for allowing railroad workers to recover for medical monitoring due to negligently inflicted toxic exposure?

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STATEMENT OF THE CASE

This case concerns the "Snowmen of Grand Central Terminal," a limited set of railroad workers who were exposed to asbestos insulation while working in Grand Central Terminal (GCT) during the late 1980s. They were called Snowmen because after finishing their work in the tunnels beneath GCT, they would emerge covered from head to toe with white pipe insulation dust. Although the defendant Metro-North Commuter Railroad knew the insulation contained carcinogenic asbestos, for years the Railroad ordered them to perform such work without warning them they actually were handling asbestos and without providing them with any protection against the asbestos.

The plaintiff Michael Buckley is one of those Snowmen. From June of 1985 to June of 1988 the Railroad exposed him to massive amounts of asbestos on a daily basis in violation of OSHA regulations designed to prevent employers from subjecting their workers to such exposure. This action was brought to provide the Snowmen with appropriate medical monitoring and an opportunity to obtain just compensation for the Railroad's negligent infliction of emotional distress (NIED).[1]

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[1] This case does not involve an "increased risk of cancer" claim (which requires a probability of future cancer for recovery); rather, Buckley's emotional distress constitutes an "increased fear of future cancer" claim, which is a present injury consisting of mental anxiety and distress over contracting cancer in the future and does not require a probability of future cancer. *Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337, 1343 n. 1. (CA2 1996).

1. Nature of Buckley's Asbestos Exposure

Michael Buckley is a pipefitter for Metro-North Commuter Railroad [JA 398]. He is married with a young son [JA 403]. He was born on May 22, 1954 and raised in Brooklyn in a family of four brothers and two sisters. He left high school after his sophomore year in order to earn money to help support his family, and began working on the railroad soon thereafter [JA 400-01; 404].

In June of 1985 Michael began working for Metro-North as a pipefitter in GCT. He was not given any safety training or protective equipment other than a hard hat and goggles [JA 406-07]. As a pipefitter he spent the majority of his time working in the network of steam tunnels under GCT that contained pipes covered with old insulation that in many areas was broken off and hanging down [JA 407-10; 615-16; Exhs. 2429; 4000; 4040]. Michael did demolition and renewal work on the steam pipes, changing valves, joints, and elbows [JA 411].

In order to perform the work he was assigned to do, it was necessary for Michael to disturb the pipe insulation [JA 412]. Metro-North told him the insulation he was working on was not asbestos [JA 409-10; 588].[2] He and his fellow pipefitters would stand under or next to the pipe being worked on, cut open the outer coating, and then hammer the insulation with a hand tool [JA 412-14]. The insulation material was dry, and would scatter all over and become airborne, "just like taking baby powder and shaking it." [JA 232-33; 413; 420;]. The dry asbestos dust filled the air and

[2] In early 1986 Metro-North's own asbestos consultant conducted a survey of asbestos in GCT, taking 150 samples of insulation material: of the 150 samples tested, 149 contained asbestos [JA 231-32; 615-16].

covered everything around them, including their hair, ears, nose, mouth, and clothing [JA 71-73; 413-15]. In an attempt to get some relief from the extreme dry heat in the tunnels, Michael and his co-workers would use fans to blow air onto their worksite, which would circulate the insulation dust even more [JA 421-22]. When he emerged from the tunnels after a job, he was covered from head to toe with white asbestos insulation dust, looking like a snowman [JA 72-73; 415-16]. Beginning in June of 1985, for nearly three years Michael averaged one hour per day of such direct physical contact with asbestos dust [JA 72; 231-32; 414-19].

From June of 1985 through June of 1988, Metro-North violated OSHA asbestos regulations by failing to provide Michael with a personal air monitoring device, which measures the amount of asbestos fibers in the air a worker is breathing [JA 247; 422-23; 447-49]. Nor did Metro-North measure the amount of asbestos fibers in the ambient air at any location and time when Michael actually was removing or handling asbestos insulation [JA 423-26; Exh. 0028]. Metro-North did not provide Michael with proper respirator protection until mid-1988 [JA 431-36; 589-90]. From June of 1985 through early September of 1987, Metro-North did not provide Michael with any asbestos protective clothing to wear while working with asbestos [JA 426-27]. He and his fellow workers wore street clothes while working with asbestos, and at times would walk through the public areas of GCT and go home on public transportation with asbestos dust all over their clothes [JA 427].

Buckley's asbestos work continued from 1985 to early 1988, at which point Metro-North contracted out the asbestos work to a outside firm rather than assign in-house employees such as Buckley to handle the asbestos insulation [JA 73; 540-41]. During the years Metro-North ordered Michael to handle and remove the asbestos insulation without any

training or protection, Metro-North paid Michael his regular wage rate of $10.00 per hour [JA 475]. The outside contractor's asbestos workers were trained and licensed to safely handle and remove the asbestos, but cost Metro-North nearly four times as much per hour than did Mike and his fellow Snowmen [JA 628, Exhibit 1078 Metro-North Requisition confirming $37.00 per hour wage rate for qualified asbestos workers]. A reasonable inference as to why Metro-North knowingly exposed the Snowmen to the asbestos is that Metro-North wanted to save money by paying its own untrained workers a fraction of what it cost to pay for licensed asbestos workers to do the job safely.[3] And given the number of Snowmen involved and their daily work with the asbestos over a period of years, it is reasonable to infer that Metro-North saved a very substantial amount of money by willfully exposing its own untrained and unprotected workers to a known carcinogen.

2. Effect of Buckley's Asbestos Exposure

The experts who testified at trial, Dr. Steven Markowitz and Dr. William J. Nicholson, are leading experts in the field of asbestos-related occupational disease. Both are full professors at Mt. Sinai Medical School's preeminent Division of Environmental and Occupational Medicine and have extensive experience in the treatment and risk assessment[4] of asbestos diseases [JA 32-36; 42-48; 188; 208-12; 220-22]. Dr. Nicholson, for example, published the criteria document for asbestos on which the United States Environmental Protection Agency (EPA) relies, and he did the risk assessment on which the United States Occupational Health and Safety Administration (OSHA)'s 1986 and 1992 occupational asbestos exposure standards are based [JA 214-15; 217-19].

When a person inhales air containing asbestos fibers, the fibers form into a longitudinal arrangement parallel with the direction of the wind stream and are swept into the lungs' tubes and parenchyma, where they can become embedded in the tissue [JA 36-37; 63]. Fibers that accumulate in the lungs also can be carried to other parts of the body through the bloodstream or lymphatic system. When they become lodged in the alveoli or in the pleural lining of the lungs, they damage the lungs' ability to clean themselves by generating irritation and initiating a scarring process in the lung tissue [JA 64; 595-601]. Asbestos is a known carcinogen that is active in many sites in the human body, causing mesothelioma, lung cancer, esophagus cancer, stomach cancer, and colon cancer [JA 222-23]. Asbestos-related diseases can be entirely prevented by controlling the release of asbestos in the work place or by providing proper respiratory protection to prevent the inhalation of asbestos fibers [JA 67; 229; 187; 601].

Buckley was exposed to "enormously high" concentrations of airborne asbestos fibers "far in excess" of OSHA's Permissible Exposure Limit while working at GCT from June of 1985 to June of 1988 [JA 236-38; 247-48]. The asbestos fibers Buckley ingested have initiated harmful biological

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[3] The posture of this case is that this Court must consider the facts in the light most favorable to the plaintiff Michael Buckley, with all reasonable factual inferences being drawn in his favor, *Purgess v. Sharrock*, 33 F.3d 134, 140 (CA2 1994).

[4] Risk assessment is the process of using epidemiological data to establish a mathematical relationship between toxic exposures and the effect of those exposures on human beings. Risk assessment allows one to measure what the risk of developing an asbestos-related disease is in relation to a person's age, intensity of exposure, and duration of exposure [JA 214].

changes in his lungs, including the activation of macrophages which damage his lung tissue as they die and release enzymes while vainly attempting to detoxify the embedded asbestos fibers [JA 77-79; 182-87].

In the field of risk assessment, a one in 1,000 increased risk of dying is a "highly significant" increased risk that should be eliminated where possible [JA 239]. An increased risk of 1% (one in 100) is ten times greater than a "highly significant risk" and a risk of 5% (one in 20) is 50 times greater [JA 244]. OSHA considers an increased risk of death from asbestos exposure in the work place of even 1% to be "substantial" and an increased risk of death from asbestos exposure of 5% to be "totally unacceptable." [JA 217-18]. As a result of his asbestos exposure at GCT, Buckley has an increased risk of dying from cancer of between 1% to 5% [JA 85-87; 242-44], ranging between "substantial" and "totally unacceptable" and ten to 50 times greater than a "highly significant" increased risk. The experts confirmed Buckley has a reasonable scientific basis to fear developing asbestos-related cancer that will continue for the rest of his life [JA 85; 94; 135; 252-53]. As a result of his asbestos exposure, Buckley's total risk of dying from cancer now has increased by up to 25% [JA 293].

3. Medical Monitoring Damages

Clinical evidence of asbestos exposure does not begin to appear until at least 10 years after the first exposure [JA 201-02], and, not surprisingly, up to this point Buckley's clinical examinations and tests have been normal [JA 180-81]. However, it is now 10 years since Buckley's first exposure to asbestos at GCT, and Dr. Markowitz recommends that Buckley commence periodic medical surveillance to detect the earliest signs of scarring, lung cancer, and GI cancers, which can be beneficially treated with injections and surgery

if caught early enough [JA 91-92; 164-65; 168-89; 180-82]. The death rate from lung cancer is very high unless it is detected and treated in its earliest stages [JA 601]. The annualized cost for those asbestos examinations and tests is $950, and will continue for the rest of his life [JA 92-94]. Buckley's medical insurance coverage does not pay for any medical treatment related to on-the-job injuries or conditions, and as a result does not pay for his asbestos-related medical monitoring [JA 455-56]. Metro-North has not paid for his past medical monitoring expenses, which total $1,080 [JA 92; 462].

4. Buckley's Emotional Distress

As a result of Metro-North's negligent conduct,[5] Buckley suffers emotional distress in the form of anger, fear of the future, and loss of peace of mind. In Michael's words, "Once I found out about it, I was mad that all the years that we were doing it, that we were just now finding out it was asbestos. I was scared, I was upset, and I was angry at Metro-North." [JA 443]. He was scared because the films shown to him by Metro-North told him how a small amount of asbestos could kill him [JA 429-30; 443]. Michael expressed his concern and fear to: his various supervisors, the Metro-North Safety Department, the White Lung Association, and finally the Metropolitan Transit Authority (MTA) Inspector General's office, which investigates crime and corruption on Metro-North [JA 443-47; JA 634-35]. The Inspector General

[5] On the eve of trial, Metro-North admitted that part of its conduct had been negligent, and then moved to bar the plaintiff from referring to any of its negligent conduct during the trial. The trial court granted the Motion In Limine and prevented the plaintiff from referring to the Railroad's negligent conduct in order to establish the full basis and context of his NIED claim [JA 594; JA 5 Docket Item #39; JA 628 & 630].

conducted a joint investigation with the New York Attorney General and issued a Joint Report on September 19, 1989 regarding the Metro-North's handling of asbestos at GCT, which concluded Metro-North had engaged in "egregious" conduct that "seriously disregarded the health and safety of its workers" such as Buckley and his fellow Snowmen [JA 602-14]. In October 1989 the New York Department of Labor conducted an asbestos inspection of GCT and cited Metro-North for numerous OSHA asbestos violations (including failure to conduct required personal air monitoring and air testing) [JA 447-49]. The effect of these official reports was to make Michael even angrier: "I am working for a company who is supposed to protect you, their Safety Department is supposed to make sure you work in a safe area. And they are not. They weren't making sure that where I had to work was safe; that I wasn't going to die from asbestos or something else." [JA 449].

From August 1987 to September 1989, Metro-North refused Michael's request that he be medically tested for his asbestos exposure [JA 453]. In October of 1989 Metro-North sent Michael for an asbestos medical test at the Railroad Medical Department in GCT where a nurse did some tests but did not provide him with a copy of the results when he asked and refused to send him to a medical doctor [JA 453-55; 566-68; 591]. It was at that point Michael decided to retain a law firm to try to hold Metro-North accountable for what it had done to him [JA 456-58]. He wanted to be examined by a qualified asbestos doctor to find out exactly what his risk was, and his attorney gave him the name of the Mount Sinai Occupational Medicine Clinic in Manhattan, where he was given a thorough asbestos medical examination and informed he had an increased risk of developing asbestos-related disease [JA 459-62].

Living with the knowledge he has a significant increased risk of dying from cancer due to his asbestos exposure scares Michael: "I try not to think about my future but I am worried about it." [JA 470; 476]. He gets upset when he gets a pain in his chest, reads about asbestos exposure in the newspapers, or sees a news story about asbestos on TV [JA 470-71]. The fact he has a wife and a young son makes him worry he may not be alive to see his son grow up or graduate from school [JA 471; 476]. He works part-time for an ambulance company, and when he sees cancer patients, it makes him feel very bad: "I look at myself." [JA 471-72].

Michael has not gone to a psychiatrist regarding his asbestos exposure because he considers the degree of his worry about asbestos to be normal, not abnormal: "What is a psychiatrist going to do for me? What is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?" [JA 472-73]. Nor has he asked for any prescription drugs as a result of his asbestos exposure: "What are drugs going to do for me? They are not going to take the asbestos away." [JA 473]. Dr. Markowitz discerned that Buckley was concerned about his asbestos exposure to an appropriate degree and he did not refer Buckley to a psychiatrist because Buckley's worry was not disproportionate to the real concern he should have over what happened to him [JA 206].[6]

His asbestos exposure has had a negative effect on Michael's temper and his relationship with his wife [JA 476-77]. He does not have much peace of mind as a result of his

[6] Michael began smoking as a teenager, and was in the habit of smoking less than a pack per day [JA 88]. However, since going to Mount Sinai he has decreased his smoking down to an average of one cigarette a day [JA 465-70], which is the equivalent of stopping smoking from a medical point of view and does not meaningfully increase his risk of contracting asbestos-related lung cancer [JA 88-91; 187].

asbestos exposure, and he feels bitter at work "when I think about what was done and what could have been prevented—what could have prevented this." [JA 475-78]. When asked what bothers him the most about Metro-North's conduct, Michael responded: "That it could have been so easily prevented with a little bit of training in the beginning and a little personal protective equipment." [JA 478]. When asked why he brought this lawsuit, Michael answered: "I wanted to make sure Metro-North be held accountable for what their people did to me." [JA 478].

Applying this Court's standard for FELA NIED claims—i.e., such claims may be brought by "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 2410 (1994)—the Second Circuit found Buckley has suffered a physical impact from the massive prolonged exposure to asbestos fibers both on his body and in the tissue of his lungs entitling him to recover for his reasonable emotional distress flowing from that physical impact [JA 640-41; 79 F.3d at 1343]. The Circuit Court also held that—in light of the evidence establishing the extent of Buckley's toxic exposure, his increased risk, and the value of monitoring--Buckley is entitled to a jury determination of his separate claim for the costs of medical monitoring [JA 648-51; 79 F.3d 1346-47].

SUMMARY OF ARGUMENT

The FELA is a humanitarian statute that must be liberally construed so as to fulfill its remedial purpose: namely, to promote safe operating conditions on the nation's railroads by holding railroads economically accountable for the injuries they negligently inflict on their workers. The genius of the FELA is that it converts railroads' economic self-

interest into a positive force for work place safety by giving railroads an economic incentive to provide work places free of known hazards to their employees' health. FELA jurisprudence is a unique form of federal common law whose overriding concern is to fulfill this remedial purpose of the Act. FELA jurisprudence gleans guidance from state common law in order to assist in the fulfillment of the FELA's underlying purpose, but state common law is not necessarily dispositive and must always be subservient to the primary goal of upholding the FELA's remedial purpose.

In the area of negligent infliction of emotional distress (NIED), one of the central concerns of state common law has been to restrict trivial, fraudulent, and unlimited claims, and this concern is expressed in a variety of tests or standards used to guarantee the genuineness of the NIED claim. The challenge in this case is to determine the standard for governing rail workers' NIED toxic exposure claims that will fulfill the paramount purpose of the FELA while also addressing the common law's concerns over restricting trivial, fraudulent, and unlimited claims.

Here, for a period of years during the late 1980s the defendant Metro-North negligently exposed the plaintiff Michael Buckley to massive amounts of asbestos (a known and regulated carcinogen) on a daily basis, thus measurably increasing his long term risk of death from asbestos-related cancer. In so doing, Metro-North saved a substantial amount of money because for all those years it paid Buckley and his fellow untrained and unprotected Snowmen only a fraction of what it would have cost to hire licensed asbestos removers to handle the asbestos safely. Unless the FELA holds railroads economically accountable for all the harmful effects of such negligent toxic exposure, railroads will have no meaningful economic incentive to avoid such conduct and the purpose of the FELA will be defeated.

The more restrictive common law "physical impact" test survives within the broader "zone of danger" test which this Court adopted in tne *Gottshall* case to govern FELA NIED claims. The physical impact test is the most appropriate common law test to apply to toxic exposure situations because one cannot have any significant toxic exposure without being actually physically impacted or contacted by the toxic substance. A plaintiff who satisfies the common law physical impact test is not required to show he has a "present physical injury" or "severe" emotional distress in order to recover for his resulting NIED. This is especially true in situations where the circumstances of the tortious conduct provide a guarantee of the genuineness of the NIED claim, such as where there is proof of significant toxic exposure or where the defendant breaches a direct duty to the plaintiff (both of which are present here).

There is no conflict between *Schweitzer* and *Buckley* because they address two entirely different types of claims: *Schweitzer* concerns pre-*Gottshall* FELA claims for clinically manifest asbestos disease whereas *Buckley* concerns a post-*Gottshall* FELA claim for NIED due to massive toxic exposure. *Buckley* is consistent with the existing body of FELA NIED toxic exposure cases, which holds that a FELA plaintiff who has sustained a physical impact with bodily harm due to negligently inflicted toxic exposure is entitled to recover for his reasonable fear of future toxic disease. *Buckley*'s four-prong standard for determining the recoverability of FELA NIED toxic exposure claims is a cautious adaptation of the common law's physical impact test which fulfills the purpose of the FELA while restricting trivial, fraudulent, and unlimited claims: it imposes a high threshold of expert proof confirming that a plaintiff has sustained enough actual physical impact with the particular

toxic substance to sustain a reasonable basis for fear of future toxic disease.

The common law always has allowed recovery for tortiously caused medical expenses, and allowing toxically exposed rail workers such as Buckley to recover damages for their medical monitoring costs honors that tradition while also holding railroads economically accountable for their negligent toxic exposure, thus fulfilling the paramount purpose of the FELA. The four-part *Paoli* test for recovery of medical monitoring claims establishes a sufficiently high burden of expert proof to restrict trivial, fraudulent, and unlimited claims while ensuring that rail workers with a legitimate basis to fear future cancer will receive the medical tests necessary to detect and beneficially treat the earliest signs of such cancers.

ARGUMENT

I. Given the policies informing the FELA and the common law, the appropriate standard for allowing railroad workers to recover for emotional distress due to negligently inflicted toxic exposure is a cautious adaptation of the "physical impact" test to the particular nature of toxic exposure.

A. The purpose and policy of the FELA

The first duty of this Court when deciding what type of claims are cognizable under the FELA is to "look to FELA itself, its purposes and background, and the construction we have given it over the years." *Gottshall,* 114 S.Ct. at 2403. The FELA is a remedial and humanitarian statute intended to be liberally interpreted so as to meet the changing conditions and concepts of industry's duties to its workers. *Urie v. Thompson*, 337 U.S. 163, 181-82, 191 (1949), *Kernan v.*

American Dredging Co., 355 U.S. 426, 431-43 (1958). The FELA seeks to adjust the cost of injury equitably between employee and employer, *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958), and to stimulate railroads to take measures for the prevention of injury to their employees and patrons, *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930). "Congress crafted a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers," *Gottshall,* 114 S.Ct. at 2404, and by imposing liability for injuries caused by the physical dangers of railroad work, the FELA "was meant to encourage employers to improve safety measures in order to avoid those claims." *Id.* at 2410. Prior to the enactment of the FELA in 1908, railroads had no economic incentive to provide safe working conditions for their employees because the law did not hold them economically accountable for the injurious consequences of those hazardous conditions. The genius of the FELA is that it converts railroads' economic self-interest into a positive force for work place safety by giving railroads an economic incentive to provide work places free of known hazards to the health and safety of their employees. In the words of one district court that extensively researched the legislative record: "the purpose and policy of Federal Employers' Liability Act legislation is to promote adequate recovery for negligently injured railroad workers and thereby promote safe operating conditions." *Kozar v. Chesapeake and Ohio Ry. Co.*, 320 F.Supp. 335, 387 (W.D.Mich. 1970), *aff'd in part and vacated in part on other grounds*, 449 F.2d 1238 (CA6 1971).[7] It is this two-fold purpose that is the essence of the statute. Indeed, without the protection of the

[7] *See generally* House Judiciary Com. Rep., H.R. Rep. No. 1386, 60th Cong., 1st Sess., 42 Cong. Rec. 4434 et seq (1908), S.Rep. No. 460, 60th Cong., 1st Sess. 2 (1908), and S.Rep. No. 432, 61st Cong., 2d Sess. 2 (1910).

FELA, railroad workers "are helpless to provide adequately for their own safety." *Sinkler,* 356 U.S. at 329.

In order to fulfill this overriding remedial purpose of the FELA, over the decades this Court has consistently interpreted the terms of the statute in a liberal and humanitarian fashion:

> On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. ... To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

Urie, 337 U.S. at 181. For example, in *Urie* this Court rejected the railroads' argument that the statutory term "injury" was limited to injuries caused by sudden trauma or accidents, holding that occupational diseases are compensable injuries under the FELA. *Id.* at 181, 186-67.

B. The role of state common law in FELA jurisprudence

FELA jurisprudence is a unique form of federal common law, and when deciding what claims are cognizable under the FELA, the common law's treatment of the right in question necessarily must be subservient to the Court's primary goal of upholding the FELA's remedial purpose and liberal course of construction. As this Court recognized in *Gottshall*, "common-law principles are not necessarily dispositive of questions arising under FELA," *Gottshall,* 114 S.Ct. at 2404,

but when the common law appropriately can be used to help fulfill the purpose of the FELA, "FELA jurisprudence gleans guidance from common-law developments." *Atchison, T. & S.F.R.Co.* v. *Buell,* 480 U.S. 557, 568 (1987). As Justice Souter stressed in his *Gottshall* concurrence, the Court's "duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law." *Gottshall,* 114 S.Ct. at 2412 [emphasis added].

As this Court acknowledged in *Gottshall*, "the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 2411. These are valid concerns, and constitute a major theme among the common law jurisdictions. There is, however, considerable variation and dissonance in how that theme is expressed. The common law has never presented a monolithic or organized front in this area. *Id.* at 2418 (J.Ginsburg, dissenting). The challenge in a FELA case is not to mechanically apply a "general" common law rule or to seek out the lowest common law denominator. Rather, the challenge is to identify the common law most consistent with the remedial purpose of the FELA and that when applied in the spirit of this Court's evolving liberal interpretation of the statute will actually fulfill its fundamental purpose of maximizing railroads' economic incentive to provide a safe workplace. *Id.* at 2410 (this Court seeks to reconcile "the concerns of the common law with the principles underlying our FELA jurisprudence."). The policies informing the FELA are always paramount, and must not be subverted by a rigid application of particular common law rules.

Metro-North is asking this Court to apply the common law so as to defeat, rather than uphold, the purpose of the

FELA. Metro-North saved a substantial amount of money by paying its own untrained workers a fraction of the amount it cost to hire licensed workers to safely handle and remove the asbestos at GCT. Metro-North did so knowing the asbestos was there and knowing of the health hazards created by exposure to that carcinogen, in flagrant violation of its statutory duty under the FELA and OSHA. Now, Metro-North is asking this Court to apply the common law to allow it to walk away from the Snowmen without being held economically accountable for the medical monitoring costs and emotional distress generated by its misconduct. Surely, when a railroad massively exposes its workers to a known carcinogen in order to save money, no common law rule or policy should protect that railroad from being held fully accountable for all the consequences. The type of employer misconduct engaged in by Metro-North here simply cannot be rewarded by a civilized society, even in the rough and tumble setting of the railroad industry. "Compensation serves to deter negligent behavior." *Ayers* v. *Jackson Tp.*, 106 N.J. 557, 525 A.2d 287, 319 (N.J. 1987), citing to R. Posner, *Economic Analysis of Law* 142-43 (2nd ed. 1977).

Metro-North must not be allowed to use the common law to turn the clock back to pre-FELA days when railroads could save money by knowingly subjecting their employees to unsafe work places. Metro-North's argument in effect asks this Court to declare that railroads have the right to save substantial amounts of money by knowingly exposing their workers to hazardous amount of toxic substances without warning, training, or protection. Unless railroads are held economically accountable under the FELA for subjecting their workers to such toxic exposures, their economic incentive to provide a toxically safe work place will be eliminated, defeating the very purpose of the FELA.

As this case unfortunately illustrates, the criminal justice system is no deterrent to this type of corporate behavior, nor does OSHA provide any practical impediment. The FELA is the only line of defense railroad workers have against such conduct—it is their only meaningful protection from being placed in a situation where their employer railroad stands to save money by unsafely exposing them to toxic substances in their work place. The common law must not be used to create a temptation on the part of railroads to save money by having their workers handle a known carcinogen without warning or protection. Holding railroads economically accountable under the FELA for engaging in such misconduct is the most practical way to encourage them to resist that temptation.

It is not enough to say that the Snowmen can sue the Railroad when a fatal cancer surfaces 20 to 40 years in the future. By that time, witnesses will be dead or long gone, documents lost or destroyed, the railroad itself merged or bankrupt. To allow a railroad to wait and say to a man dying of cancer in these circumstances, "So sue me," is no real deterrent at all. When the large amounts of today's dollars Metro-North saved by knowingly exposing the Snowmen are invested over 40 years, the funds generated will more than make up for the prospect of uncertain future damages. And why should today's managers care when it will be someone else's problem to deal with in the distant future, especially when they are enjoying the immediate benefits of saving so much money in their current budgets?

The challenge in this case is to determine what standard for allowing railroad workers to recover for negligently inflicted toxic exposure will fulfill the FELA's purpose (by maximizing railroads' economic incentive to provide a safe workplace) while also addressing the common law's concerns regarding trivial, fraudulent, and unlimited claims.

If the FELA is to be rewritten so as to allow railroads to save money by providing a knowingly unsafe toxic workplace, then that is a legislative judgment for Congress—not the judiciary---to declare.

C. The "physical impact" test survives within *Gottshall's* "zone of danger" standard for FELA negligently inflicted emotional distress

Metro-North and its amici (including Conrail) argue that the common law "zone of danger" test adopted by this Court in *Gottshall* excludes the common law "physical impact" test, and thus bars FELA NIED cases based on toxic physical impact. This artful interpretation of the *Gottshall* standard is contrary to: the express language of *Gottshall,* the common law's application of the zone of danger test, and the reading of the courts that have applied the *Gottshall* standard to FELA cases. In fact, the physical impact test remains alive within *Gottshall's* zone of danger standard, and allows recovery for FELA NIED cases where an actual physical impact occurs.

This Court's description of the zone of danger test in *Gottshall* makes it clear that the more restrictive physical impact test is subsumed within the broader, more remedial zone of danger test. Relying on Professor Richard N. Pearson's leading article on NIED,[8] this Court defines the zone of danger test as follows: "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical

[8] Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Distress—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477 (1982).

harm by that conduct." *Gottshall,* 114 S.Ct. at 2406. Because this zone of danger test "was less restrictive than the physical impact test," this Court found it to be consistent with the FELA's "broad remedial goals," "central focus on physical perils," and function of encouraging railroads to provide safe workplaces. *Id.* at 2410.

But in adopting the zone of danger test this Court did not abandon the physical impact test—on the contrary, this Court was careful to point out that "[t]he physical impact test, of course, would achieve many of the same ends as the zone of danger test. We see no reason, however, to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur." *Id.* at 2411. Obviously, when a plaintiff *does* "sustain a physical impact as a result of a defendant's negligent conduct," (rather than just being "placed in immediate risk of physical harm by that conduct"), the broader zone of danger test does not preclude the physically impacted plaintiff from recovery. *Id* at 2406. Because the facts of the *Gottshall* case did not concern a physical impact, this Court focused on when a plaintiff could recover in a pure zone of danger situation (i.e. being in a zone of danger where there is no physical impact involved). But merely because this Court directed comments to the specific fact situation at hand does not mean it excised the physical impact test from the zone of danger standard.

As the petitioner in *Gottshall*, Conrail made it emphatically clear that the zone of danger test includes the physical impact test within it ("when a railroad worker experiences a physical impact or reasonably fears the threat of a physical impact, the zone of danger test permits a recovery.") *Gottshall* Pet. Br. at p.36 (Docket # 92-1956). Indeed, Conrail stressed in its compilation of state common law tests for negligent infliction of emotional distress "that in

most instances the states that have adopted the more expansive tests also apply the more restrictive tests in appropriate circumstances." *Id.* at 45.[9] Plainly the common law zone of danger test presented by Conrail and adopted by this Court in *Gottshall* recognizes that the physical impact test survives within it. *See, e.g., Corgan v. Muchling*, 143 Ill.2d 296, 574 N.E.2d 602, 605 (Ill. 1991) (physical impact test still applies to direct victims whereas zone of danger test applies to bystanders who do not suffer any physical impact); *Kahle v. Glosser Brothers*, 462 F2d 815, 817 (CA3 1972) (zone of danger "supplemented and broadened, rather than replaced, the old 'impact' rule").[10]

Finally, all of the courts that have applied the *Gottshall* zone of danger test to FELA NIED cases have recognized that the physical impact test remains a viable element of the *Gottshall* zone of danger test. *Bloom* v. *Consolidated Rail Corp.*, 41 F.3d 911, 914-15, 916 (CA3 1994) ("Under the zone of danger test announced by the Court in *Gottshall*, [the railroad] has a legal duty if [the plaintiff] sustained a physical impact."); *Gottshall* v. *Consolidated Rail Corp.*, 56 F.3d 530, 534-35 (CA3 1995), *on remand* (no recovery because plaintiff Gottshall did not suffer a physical impact, threat of physical impact, or immediate risk of physical harm); *Marchica v. Long Island R.R Co.*, 31 F.3d 1197, 1203 (CA2 1994); *Buckley*, 79 F.3d at 1343; *Marschand v. Norfolk &*

[9] *See also id.* at pgs. 11 ("recovery for negligent infliction of emotional distress under the FELA should be limited to situations that satisfy the common law threshold requirement that the plaintiff either experience an actual physical impact or reasonably fear the threat of a physical impact."), 35, and 38.

[10] In his amicus curiae brief on behalf of the RLEA, Professor Richard N. Pearson confirms the zone of danger test did not eliminate the physical impact test, and demonstrates the lack of foundation for Metro-North's interpretation of the *Gottshall* zone of danger test.

Western Ry. Co., 81 F.3d 714, 715 (CA7 1996); and *Dennis v. Conrail*, 1994 US Dist LEXIS 12710 at n.12 (E.D.Pa. 1994).

D. The physical impact test is the most appropriate common law test to apply to FELA toxic exposure cases

Any test governing negligently inflicted emotional distress resulting from toxic exposure must take into account the peculiar nature of toxic exposure claims. A claim for toxic exposure is by its very nature a "physical impact" claim. In order for there to be a reasonable basis for fear of a future toxic disease, there must be sufficient ingestion of the toxic substance into the plaintiff's body. And in order for the toxic substance to be ingested into the plaintiff's body, the plaintiff must have significant actual physical impact or contact with the toxic substance. In other words, a plaintiff cannot have a significant increased risk of toxic disease without actually being physically impacted by the toxic substance. The fact is, when it comes to toxic exposure claims, a near miss is indeed as good as a mile: since there can be no increased risk without significant toxic exposure, and no exposure without ingestion of the toxin into the body from physical impact or contact, a plaintiff who is merely within the zone of danger (and not physically impacted by the toxin) has no basis for recovery. Thus the pure zone of danger test (where the plaintiff is not physically impacted) does not apply to toxic exposure situations. Metro-North's attempt to have this Court apply such a pure zone of danger test to toxic exposure situations is nothing more than a labored attempt to exempt toxic exposure situations from FELA coverage.

E. Physical impact cases do not require a showing of a present physical injury or severe, physically manifest emotional distress, especially where the nature of the negligent conduct itself constitutes a guarantee of genuineness

1. At common law, physical impact cases do not require a showing of present physical injury or severe emotional distress, especially when bodily harm is present

At common law, once the plaintiff satisfied the requirement of a physical impact, no further showing of a present physical injury or severe emotional distress was required to recover damages for the emotional distress resulting from the physical impact. *See* Professor Richard N. Pearson's amicus curiae brief on behalf of the RLEA at pgs. 9-13. The requirement of a physical impact is the most restrictive common law test, and no other restrictions apply once the physical impact restriction is met. The very fact that physical impact occurred serves both to guarantee the genuineness of the claim and to limit the number of individuals who can sue. After reviewing the case law and the *Restatement (Second) of Torts*, the Second Circuit recognized that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact. In such a case, the severity of the emotional distress serves to guarantee the genuineness of the claim." *Buckley*, 79 F.3d at 1346, citing case law.

The *Restatement (Second) of Torts* is a codification of the principles of the existing common law, and confirms that emotional distress resulting from a physical impact causing bodily harm is recoverable whether or not the distress is severe. The *Restatement* recognizes the basic principle of tort law that a victim of tortious conduct "is entitled to recover damages for past or prospective bodily harm and

emotional distress ... [and] reasonable medical and other expenses." *Restatement* § 924. The *Restatement* defines "bodily harm" as "any physical impairment of the condition of another's body, or physical pain or illness." *Id.* § 15. The definition of "impairment" is: "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." *Id.* § 15 Comment a.

The facts in this case establish that Michael Buckley has suffered and will continue to suffer "bodily harm" within the meaning of the *Restatement*. Due to Metro-North's negligence, Buckley was exposed to massive amounts of asbestos fibers on a daily basis over a period of three years. That exposure has caused him to ingest massive amounts of carcinogenic asbestos fibers into his lungs. The asbestos fibers have impaled and become embedded in the tissue of his lungs, altering the structure of the tissue and setting in motion an irreversibly harmful biological process involving damaging macrophage activity. That is "bodily harm" within the definition of the *Restatement*. *See Sullivan* v. *Combustion Engineering*, 248 N.J.Super. 134, 590 A.2d 681, 683 (N.J.Super.A.D.), *cert. denied*, 126 N.J. 341, 598 A.2d 897 (1991).[11]

Given the fact Buckley has suffered "bodily harm" as a result of Metro-North's negligence, the Second Circuit correctly read § 436A of the *Restatement* as confirming his

[11] In the context of asbestos insurance coverage, courts recognize that the ingestion of asbestos fibers causes "bodily harm" even without a clinical disease. *See, e.g., J.H. France Refractories Co.* v. *Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502, 505-06 (Pa. 1993), and *Mitchell* v. *Maryland Casualty Co.*, 324 Md. 44, 595 A.2d 469, 472-73, 476-78 (1991).

right to recover for whatever reasonable emotional distress flows from that negligence. Section 436A states: "If the actor's conduct is negligent as creating an unreasonable risk of *causing either bodily harm or* emotional disturbance to another, and it results in such emotional disturbance alone, *without bodily harm* or other compensable damage, the actor is not liable for such emotional disturbance." [emphasis added]. Section 436A only applies to situations where there is no bodily harm caused by the negligent conduct (i.e., it only applies to instances where the negligent conduct does not cause initial bodily harm, but rather only causes emotional disturbance which itself does not generate any bodily harm). Where, as here, Metro-North's negligent conduct does produce "bodily harm," Metro-North is liable for all of Buckley's reasonable emotional distress flowing from that negligent conduct even if his emotional distress itself does not produce any additional bodily harm (i.e., even if his emotional distress does not produce any physically manifest injury or illness).[12]

2. The common law does not require a present physical injury or severe emotional distress where the circumstances of the tortious conduct constitute a guarantee of genuineness

[12] It is important to note that "severe emotional distress" does not necessarily have to result in any physically manifest bodily harm: "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed. ... In such cases the courts may perhaps tend to look for more in the way of outrage as a guarantee that the claim is genuine; but if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required." *Restatement (Second) of Torts* Section 46 Comments j and k.

Requiring a present physical injury is one common law device for helping to screen out fraudulent or trivial injuries. *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 925-26, 616 P.2d 813 (Cal. 1980). As with all such common law restrictive devices, however, the underlying purpose of the device is to provide a guarantee of the genuineness of the emotional distress. Accordingly, where there exists a guarantee of genuineness in the circumstances of the case, proof of a present physical injury is not necessary to recover for NIED. After discussing exceptions to the rule that mental disturbance must usually be accompanied by physical injury or illness, Prosser & Keaton conclude: "[w]hat all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. ... Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery." W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 54 p. 362 (5th ed. 1984). In *Molien*, the California Supreme Court articulated the policy reasons for rejecting the physical injury requirement in favor of "some guarantee of genuineness in the circumstances of the case" as the "general standard of proof required to support a claim of mental distress." *Molien*, 27 Cal.3d at 930 (the physical injury requirement is both under and over inclusive, and encourages extravagant pleading and distorted testimony). *See also Potter v. Firestone Tire and Rubber Co*, 6 Cal.4th 965, 863 P.2d 795, 810 (Cal.1993) ("imposing a physical injury requirement represents an inherently flawed and inferior means of attempting to achieve" the goals of allowing recovery for legitimate toxic exposure claims while screening out unlimited claims).

The legitimacy of the circumstantial guarantee approach (as opposed to requiring a present physical injury) is

especially pronounced in toxic exposure cases, where courts have held that proof of exposure to toxic carcinogens sufficient to cause an increased risk of cancer is in itself a guard against feigned or trivial emotional distress claims. *Hagerty* v. *L & L Marine Services, Inc.*, 788 F.2d 315, 318, *modified*, 797 F.2d 256 (CA5 1986) ("The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness."); *Plummer v. United States*, 580 F.2d 72, 76 (CA3 1978); *Day* v. *NLO*, 851 F.Supp. 869, 879 (S.D.Ohio 1994); *Marriott v. Sedco Forex Intl. Resources Ltd.*, 827 F.Supp. 59, 75-76 (D.Mass. 1993) (significant negligent exposure to a known carcinogen with significant increased risk of death from cancer is in itself a sufficient verification of the genuineness of the emotional distress); *Nesom* v. *Tri Hawk Intern.*, 985 F.2d 208, 211 (CA5 1993) (proof of toxic exposure constitutes special circumstance guaranteeing an emotional distress claim absent physical injury).

One circumstance the common law recognizes as guaranteeing the genuineness of the resulting emotional distress is when the defendant owes and breaches a direct duty to the plaintiff. Under those circumstances, recovery for the plaintiff's resulting emotional distress is allowed without a showing of physical injury or manifestation. *See, e.g., Jacoves v. United Merchandising Corp.*, 9 Cal.App.4th 88, 11 Cal.Rptr.2d 468, 488 (Cal.App. 2 Dist. 1992) ("Recovery for negligently inflicted emotional distress is possible where the defendant owes the plaintiff a direct duty and the plaintiff suffers emotional distress, even where there is no accompanying physical injury."); *Campbell v. A.C. Equipment Services Corp. Inc.*, 242 Ill.App.3d 707, 610 N.E.2d 745, 750 (Ill.App. 4 Dist. 1993): (in an employee asbestos exposure case, where a defendant employer knowingly breaches a duty to the plaintiff, emotional distress without physical manifestation is allowed), and *Gerardi* v.

Nuclear Utility Services, 149 Misc.2d 657, 566 N.Y.S.2d 1002, 1004-05 (Sup. 1991) (same); *Chizmar* v. *Mackie*, 896 P.2d 196, 203, 205 (Alaska 1995) (where the nature of the defendant's relationship to the plaintiff "imposes on the defendant a duty to refrain from conduct that would foreseeably result in emotional harm to the plaintiff, the plaintiff need not establish a physical injury in order to recover for the negligent infliction of emotional distress," nor must the emotional distress be medically diagnosable or objectifiable); *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993) (nature of parties' relationship gives rise to duty to refrain from activity which carries unreasonable and foreseeable risk of causing emotional or mental harm); *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990) (exception to physical injury requirement exists where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm); *Mortise* v. *United States*, 1996 U.S.App. LEXIS 33508 at *9-*10 (CA2 Dec. 24, 1996).

When a defendant breaches such a direct duty, there are compelling policy reasons for relaxing the various common law restrictions on recovery of NIED. In the words of the California Supreme Court in the *Potter* case (which concerned a corporate landfill owner who improperly disposed of toxic wastes in order to save money, thus exposing adjacent landowners to carcinogens): "[w]hen a defendant acts with oppression, fraud or malice, no reason, policy or otherwise, justifies application of the more likely than not threshold. Any burden or consequence to society from imposing liability is offset by the deterrent impact of holding morally blameworthy defendants fully responsible for the damages they cause, including damage in the form of

emotional distress suffered by victims of the misconduct who reasonably fear future cancer." *Potter*, 863 P.2d at 817.[13]

Under both the FELA and OSHA, Metro-North owed a direct duty to Michael Buckley to provide him with a work place reasonably safe from known carcinogens such as asbestos. Metro-North breached that direct duty when for years -- in order to save money -- it knowingly ordered Michael to handle the asbestos insulation without any warning or protection. For years Metro-North assured the Snowmen they were in no danger from the pipe insulation when in fact Metro-North knew it was asbestos and knew of the health hazards posed by that carcinogen. As a result of Metro-North's egregious conduct, Buckley now has emotional distress in the form of a reasonable fear of future asbestos-related cancer, anger, and loss of peace of mind.

Under both the "circumstantial guarantee" and "breach of direct duty" common law exceptions, Buckley's detailed proof of the fraudulent and oppressive circumstances surrounding Metro-North's breach of its direct duty to protect him from a known carcinogen constitutes in itself a sufficient guarantee that his distress is genuine and reasonable rather than trivial or fraudulent. The common law's "physical injury" and "severe" distress restrictions do not apply here. Given its egregious conduct, Metro-North is not entitled to the protection of such common law restrictions, and the purpose of the FELA would be defeated to hold otherwise. As Justice Stevens noted in *Buell*, "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the *nature of the injury* and

[13] Recovery based on such oppressive or fraudulent conduct is still grounded in negligence, as such conduct does not rise to the level of intentional infliction of emotional distress, which remains a separate and distinct cause of action. See *Potter*, 863 P.2d at 818-20.

the *character of the tortious activity*. ...broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." *Buell*, 480 U.S. at 568-70 [emphasis added]. Certainly the character of Metro-North's tortious activity must be taken into account here, as must the particular nature of Buckley's toxic exposure injury.

Metro-North's argument that Buckley's emotional distress is temporary, evanescent, and trivial is belied by the facts in the Record and by the nature of his toxic exposure. In effect, Metro-North has placed a ticking time bomb in Buckley's chest, a time bomb that may never go off but which he will have to live with for the rest of his life. The fact that Metro-North's negligence has condemned him to a lifelong vigil for an asbestos cancer to surface determines the nature of his emotional distress: anger over being subjected to what was a completely avoidable exposure, loss of peace of mind due to a reasonable fear of future cancer, and sense of outrage at being treated by his employer as if his life and well-being have no value. His understandable resulting distress is not temporary or evanescent or trivial, but has become a permanent part of this life.

F. *Buckley* is consistent with previous FELA toxic exposure negligent infliction of emotional distress cases

1. *Schweitzer* is not a FELA negligent infliction of emotional distress case, and does not control here

Schweitzer v. *Consolidated Rail Corp.*, 758 F.2d 936 (CA3), *cert. denied*, 474 U.S. 864 (1985), is a pre-*Gottshall* bankruptcy case that did not concern a FELA claim for NIED. Rather, the claims in *Schweitzer* were for clinically manifest asbestos diseases. The narrow issue actually decided by *Schweitzer* was "whether plaintiffs, who allege

that they were exposed to asbestos prior to their employer's [Bankruptcy Act] reorganization and did not manifest any injury until after the relevant consummation dates, had 'claims' that were discharged in the reorganization proceedings." *Schweitzer*, 758 F.2d at 941. Following the discovery rule applied to FELA occupational disease cases by *Urie*, the Third Circuit held that since claims for clinically manifest asbestos disease do not accrue until the disease is clinically manifested, the plaintiffs' claims were not discharged by the railroad's bankruptcy reorganization. *Id.* at 944 ("We conclude, therefore, that plaintiffs' future FELA causes of action were not dischargeable claims under § 77"). That is the proper narrow holding of the case.[14] Unfortunately, *Schweitzer* also has been cited for the unwarranted proposition that *any* FELA claim stemming from asbestos exposure does not come into existence until a clinical disease manifests itself.

Schweitzer did not involve or address FELA claims for the negligent infliction of emotional distress resulting from asbestos exposure. Indeed, it was not until nine years later that this Court in its landmark *Gottshall* decision first set forth the standard for FELA NIED claims. A post-*Gottshall* FELA claim for NIED is markedly different from a FELA claim for a clinically manifested asbestos disease. The NIED claim does not require any physical injury at all. In fact, that is what defines a FELA claim for NIED: it is a cause of action for emotional distress that accrues even though there is

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[14] See *Zulkowski* v. *Consolidated Rail Corp.*, 852 F.2d 73, 76 (CA3), *cert. denied*, 488 U.S. 994 (1988) ("Inasmuch as the employees in *Schweitzer* did not have manifest injuries prior to the reorganization, their claims could not have been discharged under section 77."); *Matter of Penn. Cent. Transp. Co.*, 71 F.3d 1113, 1115 (CA3 1995), *cert. denied*, 116 S.Ct. 1851 (1996); *Bocook* v. *Ashland Oil, Inc.*, 819 F.Supp. 530, 535 n.6 (S.D.W.Va. 1993).

no manifest physical injury. *Gottshall,* 114 S.Ct. at 2405. There is no conflict between *Buckley* and *Schweitzer* because they address two entirely different types of claims: a post-*Gottshall* FELA claim for the NIED due to massive toxic exposure is simply not a FELA claim for a clinically manifest asbestos disease. As a FELA negligently inflicted emotional distress claim, *Buckley* is governed by *Gottshall,* not *Schweitzer*.[15]

2. FELA toxic exposure negligent infliction of emotional distress cases support *Buckley*

FELA jurisprudence has the benefit of a developing body of FELA toxic exposure case law, beginning with the *Hagerty* case in 1986. The *Buckley* decision is fully consistent with the holdings of those FELA toxic exposure cases: where the evidence shows that a FELA plaintiff has sustained a physical impact due to negligently inflicted toxic exposure, that FELA plaintiff is entitled to recover emotional distress damages for his reasonable fear of future toxic disease.

The first FELA toxic exposure case involving fear of future cancer and medical monitoring is *Hagerty* v. *L. & L. Marine Services, Inc.*, 788 F.2d 315, 318, *modified*, 797 F.2d 256 (CA5 1986). When Hagerty's clothes and skin were

[15] Similarly, none of the FELA cases following *Schweitzer* involved a FELA claim for the NIED or for medical monitoring. *Batko* v. *Ogilvie*, 1986 WL 5761 (N.D.Ill) (arose out of a pre-*Gottshall* bankruptcy case); *Zulkowski*, 852 F.2d at 76 (a claim for asbestosis which did not become manifest until after the railroad's bankruptcy reorganization is not discharged by the bankruptcy); *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 23986 (E.D.Pa.) (case dismissed without prejudice for failure of counsel to provide court-ordered basic information regarding extent of exposure and medical evidence). See also *Sullivan* 590 A.2d at 684, distinguishing *Schweitzer*.

drenched with a carcinogenic chemical, he suffered some trivial sensations but had no symptoms or manifestations related to cancer. However, he was aware of the carcinogenic effect of the chemical and when his doctor recommended he undergo periodic medical exams to monitor for signs of cancer, he became fearful of contracting cancer in the future. The Fifth Circuit rejected the defendant's argument that the physical injury requirement must apply to such fear of cancer claims to guard against unworthy claims. Noting that such a restriction also would deny worthy claims, the Court held that the circumstantial guarantee approach was the better device to differentiate worthy and unworthy toxic exposure claims: "a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence. The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness. It is for the jury to decide questions such as the existence, severity and reasonableness of the fear." *Id.* at 318.

Amendola v. Kansas City S.R. Co., 699 F.Supp. 1401 (W.D. Mo. 1988), involved a group of railroad workers who alleged they had come into contact with asbestos during their employment and who sought damages under the FELA for fear of contracting future asbestos-related diseases. After considering the policies underlying the FELA in light of the common law's concerns over restricting a flood of claims, the court found "that a claim under the FELA for emotional distress, negligently caused, must be accompanied by allegations of physical harm which either caused or was caused by the emotional distress." *Id.* at 1409. The court went on to conclude:

> The physical harm requirement is a necessary limitation on the ability to recover under the FELA

> for the fear of contracting asbestos-related diseases. This requirement will serve to limit trivial, frivolous or premature claims. The Court has declined to adopt the strictest variation of the tort of negligent infliction of emotional distress which requires a physical injury as a *precondition* to recovery for emotional distress. The rule adopted by the Court is a moderate rule which will allow plaintiffs to pursue meritorious claims under the FELA for the negligent infliction of emotional distress while keeping the floodgates intact. The plaintiffs in this action have not alleged physical harm either causing or caused by their fear of contracting asbestos-related diseases. Thus, plaintiffs fail to state a claim upon which relief may be granted under the FELA.

Id. at 1411. The court carefully distinguished between "physical injury," which is *not* a precondition for a FELA fear of future asbestos cancer claim, and some "physical harm" either causing or caused by the fear of future asbestos disease, which is a requirement. When used in opposition to the term "physical injury," the term "physical harm" is synonymous with the *Restatement's* "bodily harm." As discussed above, there is "bodily harm" whenever "the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." *Restatement* at § 15 Comment a. Here, Michael Buckley proved he has suffered bodily harm in the form of harmful alterations to the tissue of his lungs which in turn has caused his emotional distress. *Amendola* confirms he does not have to establish a "physical injury" as a precondition to recover NIED damages under the FELA for his fear of developing future asbestos-related disease.[16]

[16]The district court in this case recognized *Amendola's* distinction between physical injury and physical harm when deciding the Railroad's Motion to Dismiss in 1990, *Giammona* v. *Metro-North Commuter R.R.*, 750 F.Supp. 662, 664 (S.D.N.Y. 1990) (rejecting a requirement of a physical injury, the court held "we find that the allegation that plaintiff has suffered a detrimental physical change in his body tissue would, if substantiated, be sufficient to support recovery for emotional harm under FELA").

In *Marriott* v. *Sedco Forex Intl.Resources*, 827 F.Supp. 59 (D.Mass 1993), the plaintiff's employer inoculated him with a hepatitis vaccine taken from a batch later determined to be contaminated with HIV, the virus which causes AIDS. The plaintiff did not test positive for AIDS but suffered a purely emotional injury consisting of a fear of developing AIDS. He had no present physical injury and had no physical manifestation of his fear. He filed a Jones Act claim seeking recovery for his emotional distress, and the district court reviewed the common law jurisprudence in light of the policies underlying FELA emotional distress claims. The court held that the plaintiff was entitled to recover damages under the FELA for his fear of future AIDS disease even though his emotional distress was not manifested in the form of physical injury or illness, noting: "If a claim can be tied to a distinct event which could cause a reasonable person to develop a fear of contracting a disease like AIDS, there is a guarantee of genuineness of the claim." *Id.* at 75. The court concluded, "due to the clear-cut and egregious manner of [the plaintiff's] exposure, it seems beyond peradventure that [the plaintiff] reasonably suffered genuine emotional distress." *Id.* at 75-76.

Marchica v. *Long Island R. Co.*, 31 F.3d 1197 (CA2 1994), is the first post-*Gottshall* FELA toxic exposure NIED case. *Marchica* involved a plaintiff whose hand was pricked by a discarded hypodermic needle. There was no proof he actually was exposed to the HIV virus, but the prick occurred

under circumstances that could cause a reasonable person to develop a fear of AIDS. The Second Circuit found the plaintiff satisfied the *Gottshall* test: "Because he suffered a physical impact, Marchica is entitled to receive compensation for all injuries—physical and emotional—proximately caused by the physical impact." *Id.* at 1203. After reviewing the common law fear of future disease cases, the Second Circuit concluded: "[w]e adopt the approach of those cases just discussed which take a more flexible view because they are most consistent with FELA's remedial nature. Thus, a FELA plaintiff who has suffered a physical impact may recover for fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS." *Id.* at 1206.

Buckley is the only other post-*Gottshall* FELA toxic exposure NIED case. The Second Circuit found that Buckley's massive exposure to asbestos fibers on a daily basis for three years (which has caused harmful changes in his lung tissue) constitutes a physical impact that would lead a reasonable person to fear asbestos-related cancer. The Court stressed that in a FELA toxic exposure case, "the relevant inquiry is whether the impact would cause fear in a reasonable person. To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." *Buckley,* 79 F.3d at 1344. The Second Circuit was well aware of the common law's concerns, but expressly declined to impose a "physical injury" or "severe" emotional distress requirement in a FELA toxic exposure case where there has been actual physical impact with the toxic substance under circumstances that would lead a reasonable person to fear developing a future toxic disease. *Id.* at 1344-46.

The *Buckley* decision is fully consistent with the developing body of FELA toxic exposure NIED case law. Striking an appropriate balance between upholding the humanitarian purpose of the FELA and addressing the common law's concerns over trivial and fraudulent claims, this body of case law: allows recovery where there is a toxic physical impact with some bodily harm; declines to impose a "physical injury" or "severe" distress requirement in FELA toxic exposure NIED claims and instead adopts the circumstantial guarantee approach for supplying the indicia of genuineness; and leaves the reasonableness and severity of the plaintiff's fear of the future as questions for the FELA jury to decide. As discussed above, the circumstantial guarantee approach to establishing genuineness is especially appropriate for toxic exposure cases. To paraphrase the *Marchica* court's articulation of the circumstantial guarantee test for FELA toxic exposure claims: "Thus, a FELA plaintiff who has suffered a physical impact may recover for fear of developing [a toxic disease] if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of [the toxic disease]." *Marchica,* 31 F.3d at 1206.

G. Given that the FELA is a remedial statute to be liberally interpreted so as to achieve its humanitarian purpose, the more remedial line of common law toxic exposure cases offers the most appropriate guidance here

1. Remedial common law toxic exposure cases

As discussed above, FELA jurisprudence must not be reduced to a contest to see which side can cite the greatest number of common law cases in support of any particular position. One can marshal common law citations to support virtually any proposition one can imagine. As Justice

Ginsburg noted, "there is no unitary common law governing claims for negligent infliction of emotional distress" for the common law of emotional distress "exists not in the singular, but emphatically in the plural." *Gottshall,* 114 S.Ct. at 2418 (J.Ginsburg, dissenting). Merely because a common law test may have substantial support does not necessarily mean it is appropriate to apply it in the context of the FELA if the result is to frustrate the humanitarian purpose of the Act. Thus, when a court looks to the common law for guidance while in the uncharted regions of the FELA, the polestar must always be those constellations of common law cases that will assist the court in achieving, not circumventing, the remedial purpose of the FELA.

With this in mind, a scan of the common law universe reveals a constellation of toxic exposure cases that provides the most appropriate remedial guidance for FELA fear of future toxic disease cases. For the convenience of the Court, an illustrative compilation of those cases is set forth in Appendix A broken down by category of toxic exposure: asbestos, contaminated water, radiation, and contact with chemicals or infectious agents. Those cases express the common law's more remedial nature, allowing recovery for NIED where there is a showing of toxic physical impact under circumstances that would cause a reasonable person to fear future toxic disease.[17]

[17] At pages 18-20 of its Brief, Metro-North discusses issues regarding claim-splitting and statutes of limitations that it admits were never raised or discussed at the trial court or circuit court levels, and which were not contained in the Petition for Certiorari's Questions Presented. Those issues are not properly before this Court. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("this Court does not decide questions not raised or involved in the lower court."); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980). Nevertheless, Metro-North ignores the fact that the original remedial "discovery rule" precedent for latent occupational diseases is this Court's FELA decision in *Urie* v. *Thompson*, 337 U.S. 163 (1949), holding that a FELA action for a manifested

2. The remedial line of common law cases is the most appropriate line to apply in the context of the FELA

The definition of "remedial" is: "Of the nature of a remedy; intended to remedy wrongs or abuses." *Black's Law Dictionary* (4th ed. 1968). The wrong and abuse that needs to be remedied here is very simple: Michael Buckley and his fellow railroad workers do not want to be placed in a position where their employer stands to save money by exposing them to toxic substances without warning, training, or protection, thereby measurably increasing their long-term risk of death and debilitating disease. The remedy they seek under the FELA is to hold the railroads economically accountable for such wrong and abusive conduct to the fullest extent the liberal and humanitarian tradition of FELA jurisprudence will allow. In so doing, the FELA will fulfill its purpose of making sure that the nation's railroads have a meaningful economic incentive to provide a safe work place reasonably free of hazards to the health and well-being of their workers.

Metro-North, however, is asking this Court to wield the common law as a sword to undercut the salutary purpose of the FELA. Through its restrictive invocation of the common law, Metro-North would have this Court largely suspend the remedial effect of the FELA in the area of toxic exposure. Metro-North is asking this Court to grant it dispensation to save substantial amounts of money by negligently exposing its workers to toxic substances, with the only economic deterrent being the distant prospect of a lawsuit filed some 20

occupational disease does not accrue until the plaintiff knew or should have known of the clinical manifestation. And the first FELA toxic exposure fear of cancer case properly recognized that the remedial "separate disease" rule for toxic cancers is most appropriate for FELA cases, *Hagerty,* 788 F.2d at 320-21.

to 40 years in the future by a former worker who is dying of cancer and whose access to the documents and witnesses necessary to prove his case will be severely impaired by the passage of time.

Metro-North seeks to achieve this result by urging that this Court incorporate into the FELA the most restrictive common law rules regarding recovery for NIED: no recovery without a present physical injury or without emotional distress so severe it results in a physical manifestation confirmed by medical or psychiatric testimony. But those restrictive rules are merely expressions of the common law's underlying concern that there be an indicia of genuineness to help guard against trivial, fraudulent, and unlimited claims for NIED. Not all common law jurisdictions require the imposition of those rules, especially where the circumstances of the tortious conduct provide a sufficient indicia of genuineness. Actual exposure to a known carcinogen that measurably increases a plaintiff's risk of dying of cancer provides such a circumstantial guarantee. A defendant's breach of a direct duty to the plaintiff is another type of circumstantial guarantee. A "present physical injury" or "severe" emotional distress is not required in those situations because the circumstances themselves satisfy the common law's concern for an indicia of genuineness and because the policy considerations tilt against the blameful defendant and in favor of the innocent victim.

Moreover, the fact Michael Buckley has suffered physical impact with bodily harm is in itself a sufficient guarantee of the genuineness of his distress to allow recovery under both traditional common law and FELA principles. Metro-North acknowledges this in a backhanded fashion by laboriously misreading *Gottshall's* zone of danger test to exclude the physical impact test, when in fact the physical impact test has always survived within the broader more liberal zone of

danger standard. And Metro-North's reliance on the most restrictive common law rules totally ignores the existing body of FELA toxic exposure cases, all of which refuse to frustrate the remedial purpose of the Act by incorporating the most restrictive common law rules into the jurisprudence of the FELA.

As the Second Circuit recognized in *Buckley*, there is an ample guarantee of genuineness in the circumstances of this case: Metro-North negligently exposed Michael Buckley to massive daily doses of asbestos for a period of years without warning or protecting him despite the fact Metro-North knew of the health hazards the carcinogenic asbestos posed. In so doing, Metro-North breached its direct legal duty to Michael under both the FELA and OSHA to provide him with a work place reasonably safe from exposure to known carcinogens. And as a result, Michael has a reasonable scientific and medical basis to fear his increased risk of dying from asbestos-related cancer. Under both prior FELA toxic exposure case law and the appropriate line of remedial common law, Michael Buckley is entitled to recover for his reasonable emotional distress generated by this type of tortious conduct.

H. *Buckley's* cautious adaptation of the physical impact test fulfills the purpose of the FELA while addressing the common law's concerns

The only post-*Gottshall* FELA toxic exposure case prior to *Buckley* was *Marchica*. *Marchica* makes it clear that the relevant inquiry in determining the genuineness of a FELA toxic exposure NIED claim is whether the toxic impact would cause fear in a reasonable person. Guided by this holding, the Second Circuit set forth a four-prong test for making that determination, namely, the jury must take into account (1) the nature of the toxic substance; (2) its method

of transmission into the body; (3) the extent of the exposure to the substance; and (4) how the disease develops in response to the presence of the toxic substance in the body. *Buckley,* 79 F.3d at 1344.

The application of this four-prong test enables the factfinder to determine whether the plaintiff's exposure was such as to establish a sufficient basis for fear in a reasonable person, and, if so, the extent of that fear. This test addresses the common law's concerns over restricting trivial, fraudulent, and unlimited claims by imposing a high threshold of expert proof on the plaintiff. The testimony of the plaintiff is not enough to recover because in order to satisfy each of the four prongs there must be competent scientific and medical testimony establishing the nature of the toxin, its method of transmission into the body, the extent of the plaintiff's exposure, and the effect of that exposure on the plaintiff. As the Second Circuit noted, "incidental" or "normal" contact with a toxin such as asbestos is not enough to satisfy this test. *Buckley,* 79 F.3d at 1344. There must be sufficient contact with the particular toxin to form a reasonable scientific basis for fear of developing a future toxic disease. The amount of that contact necessarily varies from substance to substance, but it is the plaintiff's heavy burden to prove by competent expert testimony each of these elements to the satisfaction of the trial court (as a prima facie matter) and to a jury at trial.

Michael Buckley clearly satisfies this test. He proved he has a significant measurable increase in his risk of dying from asbestos-related cancer due to his prolonged massive physical contact with asbestos fibers far in excess of OSHA's permissible limits. By contrast, a worker at GCT who merely had incidental contact with asbestos lacks a sufficient scientific basis to fear cancer and thus has no claim. By screening out such trivial exposures, *Buckley's* test limits

claims to situations where a plaintiff can prove he has a legitimate scientific basis to fear a future toxic disease due to significant toxic impact.

It must be stressed that the Second Circuit's test is actually a very cautious adaptation of the common law's physical impact test in the context of toxic exposure. Not just any physical impact, however slight, will allow recovery. On the contrary, the plaintiff can only recover if his physical impact with the toxic substance is so extensive that there is a reasonable scientific basis for him to fear developing a future toxic disease. To prove that, competent expert testimony is required. So the *Buckley* test actually is far more restrictive than the common law physical impact test, but the restrictions are appropriate in the context of FELA toxic exposure cases in order to satisfy the common law's legitimate concern over restricting trivial, fraudulent, and unlimited claims while still fulfilling the remedial purpose of the FELA.

II. Given the policies informing the FELA and the common law, the appropriate standard for allowing railroad workers to recover for medical monitoring due to negligently inflicted toxic exposure is the *Paoli* test

A. Common law acceptance of medical monitoring

Providing for the recovery of medical expenses flowing from tortious conduct always has been a central theme of the common law, and medical monitoring is a modern variation on that common law theme. It is an expression of the common law's developing response to the modern phenomenon of toxic exposure, and is fully consistent with the policies and purpose underlying the FELA.

The seminal medical monitoring case is *Friends For All Children, Inc.* v. *Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C.Cir. 1984). Noting that the *Restatement (Second) of Torts* defines "injury" as an "invasion of any legally protected interest of another," *Restatement* at § 7, the D.C. Circuit Court concluded that "[i]t is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations." *Friends,* 746 F.2d at 826. It is hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred as a result of any injury. *Buckley,* 79 F.3d at 1347, citing to C. McCormick, *Handbook on the Law of Damages* § 90 (1935). "The injury in a medical monitoring claim is the cost of the medical care that will, one hopes, detect" the anticipated harm. *In Re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 850 (CA3 1990), *cert. denied*, 499 U.S. 961 (1991) [*Paoli I*]. Recognition of the need for medical monitoring damages "does not create a new tort," it "is simply a compensable item of damage when liability is established under traditional tort theories of recovery." *Potter,* 863 P.2d at 823.

A review of common law jurisdictions reveals that, in addition to FELA jurisprudence (*Hagerty* and *Buckley*), there are 19 jurisdictions that allow damages for medical monitoring costs in the absence of a physical injury, and four jurisdictions that require a showing of a physical injury in order to recover medical monitoring damages. For the convenience of the Court, a compilation of these jurisdictions is set forth in Appendix B.

B. Purpose and policy of medical monitoring

There are forceful public policy reasons impelling the spread of the common law rule allowing recovery for medical monitoring in toxic exposure cases without proof of present physical injury. These policy reasons are: (1) an important public health interest in fostering access to medical testing in order to give toxically exposed individuals the benefit of early diagnosis, thus improving their prospects for treatment and minimizing their disability and death; (2) furthering the deterrent function of the tort system by compelling those who negligently expose others to toxic substances to bear the costs, thus maximizing economic incentive to avoid the irresponsible discharge of toxic substances; (3) reducing the overall costs to defendants and society by preventing or mitigating serious future illness caused by negligent toxic exposures; (4) avoiding the elemental injustice of forcing economically disadvantaged individuals who have been wrongfully exposed to dangerous toxins to bear the cost of medical surveillance necessitated by another's negligence; and (5) furthering the equitable efficiency of the legal system by enabling the plaintiff to establish the causal connection between the defendant's tortious conduct and the harmful toxic exposure at an early stage when the details of proof are most readily available (as opposed to decades later when the elements of proof have been severely degraded by the passage of time). *Potter,* 863 P.2d at 824; *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993), *cert. denied*, 115 S.Ct. 1253 (1995); *Ayers*, 525 A.2d at 311-12.

C. Elements of proof for a medical monitoring claim

To recover medical monitoring costs, a plaintiff must show by competent medical proof that he or she has a significant increased risk (but not necessarily a probability)

of future disease which warrants medical surveillance in order to detect and beneficially treat the earliest clinical signs of the disease. *Paoli I,* 916 F.2d at 851; *Hansen, supra,* at 979; *Potter, supra,* at 824. Courts have articulated various tests for recovering medical monitoring damages, but the essential elements of proof remain the same. *Ayers, supra,* 312; *Paoli I, supra,* at 852 and *Paoli II,* 35 F.3d 717, 787-88 (CA3 1994), *cert. denied*, 115 S.Ct. 1253 (1995); *Hansen, supra,* at 979-80; *Potter, supra,* at 824-25. The test set forth in the *Paoli* cases has been relied on by most of the medical monitoring cases. *See* Appendix B. It is a straightforward recitation of the essential elements of proof necessary for establishing the legitimacy of such a claim, and is consistent with the policy concerns underlying both the FELA and common law. Those elements of proof are:

1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.

2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

3. That increased risk makes periodic diagnostic medical examinations and testing (beyond the ones that would have been prescribed for the plaintiff in the absence of the particular toxic exposure) reasonably necessary.[18]

4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

[18] For example, medical monitoring for a preexisting condition would not be included, unless the toxic exposure caused an increase in or different type of medical monitoring for that preexisting condition. *Potter,* 863 P.2d at 825 n.27.

Paoli II, 35 F.3d at 787-88, incorporating *Hansen's* standard; *Buckley,* 79 F.3d at 1347. These elements must be proven by competent expert testimony. *Ayers,* 525 A.2d at 312; *Paoli I,* 916 F.2d at 852.

Courts recognize that "no particular level of quantification is necessary to satisfy" the requirements of "significant exposure" and "significant increased risk." *Hansen,* 858 P.2d at 979. In order to establish significant increased risk, "the plaintiff must prove that the exposure was of sufficient intensity and/or duration to increase his or her risk of the anticipated harm significantly over the plaintiff's risk prior to exposure." *Id.* at 979. Significant exposure "refers to an exposure which, either by duration or harm, is sufficient to cause a significant increased risk, which in turn is sufficient to require a monitoring regime different from that normally required in the absence of such an exposure." *Redland Soccer Club* v. *Dept. of Army of U.S.,* 55 F.3d 827, 846 (CA3 1995), *cert. denied,* 116 S.Ct. 772 (1996). Depending on the nature of the toxic substance and extent of exposure, OSHA or EPA standards may be of some assistance, but ultimately "it is for the trier of fact to decide, on the basis of competent medical testimony, whether and to what extent the particular plaintiff's exposure to toxic chemicals in a given situation justifies future periodic medical monitoring." *Potter,* 863 P.2d at 825.

D. The *Paoli* test fulfills the purpose of the FELA while addressing the common law's concerns

The *Paoli* test fulfills the purpose of the FELA by holding railroads economically accountable for their negligent toxic exposure, thus providing an incentive to avoid such exposures in the work place. Without the deterrent effect of such damages, railroads will be in a position to save money by ordering their untrained and

unknowing workers to handle toxic substances at below-market cost, defeating the purpose of the FELA.

The *Paoli* test addresses the common law's concerns by restricting trivial, fraudulent, and unlimited claims. Courts flatly reject the argument that allowing damages for medical monitoring without requiring a present injury or particular level of quantified increased risk will open the floodgates for such claims: *Paoli I,* 916 F.2d at 788 (plaintiffs not likely to desire additional medical tests unless they are really needed, amount of damages not high enough to provoke flood of litigation); *Potter,* 863 P.2d at 825 (the elements of proof provide a "substantial evidentiary burden," only monitoring costs beyond usual regime are recoverable, amount of costs is not speculative because they are based on specific dollar costs for recognized medical examinations); *Hansen,* 858 P.2d at 978 & 981 (elements of proof "prevent unnecessary litigation and unwarranted recoveries," as only "reasonable and necessary" costs will be compensated); *Day* v. *NLO*, 851 F.Supp. at 880 ("courts concerns over damages which are uncertain, speculative, or conjectural are overcome by the reasonableness of compensation for diagnostic tests in cases where liability has been established. ... the reasonableness of the tests is one the court can adequately adjudicate in light of expert testimony, with minimal risks of uncertain, speculative or conjectural recoveries."). In the words of one court that adopted the *Paoli* test, requiring proof of those elements "should remove the questions of the existence of an injury and the need for medical testing from the realm of speculation and also limit the availability of the remedy to a determinable universe of plaintiffs." *Bocook v. Ashland Oil Inc.*, 819 F.Supp. 530, 537 (S.D.W.Va. 1993).

E. Buckley is entitled to a jury determination of his claim for medical monitoring damages

The evidence in this case establishes that Michael Buckley is entitled to submit his claim for medical monitoring costs to a jury. The question is not whether it is probable that Buckley will develop an asbestos-related cancer in the future, but rather whether medical monitoring is reasonably necessary in order to diagnose and treat the early signs of such cancers. *Buckley,* 79 F.3d at 1347. As the Second Circuit found, given the reliable expert testimony demonstrating the massive extent of his exposure, the significance of his increased risk, the seriousness of the cancers for which he is at risk, and the reasonable medical necessity for his monitoring, a reasonable jury could award him medical monitoring costs. He is entitled to a jury determination of his damages, especially since this is a FELA case where "the right of the jury to decide the issue of causation must be 'most liberally viewed,'" with the standard being whether Metro-North's negligence played any part, no matter how slight, in causing his injury. *Marchica,* 31 F.3d at 1207, citing to *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957).

Metro-North must be held liable for Michael Buckley's medical monitoring costs if the purpose of the FELA is to be upheld. If, as a matter of federal common law, this Court declares that railroads cannot be held liable under the FELA for the medical monitoring costs they negligently inflict on their workers, then the function of the FELA in creating and maintaining an economic incentive to provide a reasonably safe work place will be thwarted. Indeed, such an exemption from FELA accountability will have the perverse effect of creating an economic incentive on the part of railroads to save money by exposing their workers to toxic substances without telling them, training them, or protecting them. The

remote prospect of facing a law suit in 20 to 40 years when the plaintiff is disadvantaged both by a fatal cancer and the absence of vital documents and witnesses, is simply not enough of a deterrent to check such misconduct.

Michael's health insurance does not cover employment-related asbestos medical expenses, and unless Metro-North is held accountable he will be forced either to personally bear the lifelong economic burden of tests caused by Metro-North's egregious conduct, or to forgo those reasonably necessary medical tests with the attendant risk that he will not receive any treatment until a cancer becomes unstoppably full blown. The last question Michael answered on direct examination was: "Why did you bring this lawsuit, Mr. Buckley?" His answer was: "I wanted to make sure Metro-North be held accountable for what their people did to me." [JA 478]. Releasing Metro-North from accountability under the FELA for such conduct would be a denial of elementary justice that would only serve to weaken the FELA while further victimizing Michael and his fellow Snowmen.

CONCLUSION

The Second Circuit's decision below should be affirmed, with the case remanded for a retrial.

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APPENDICES

APPENDIX A

REMEDIAL COMMON LAW TOXIC EXPOSURE CASES

Asbestos: recovery for emotional distress allowed based on significant exposure to asbestos where there is no clinically diagnosed disease or injury present or where there are only aymptomatic asbestos-induced changes present in the lung tissue:

Watkins v. Fibreboard Corp., 994 F.2d 253, 259 (CA5 1993);

Campbell v. *A.C. Equipment Services*, 242 Ill.App.3d 707, 610 N.E.2d 745, 750 (Ill.App.4 Dist.1993);

Gerardi v. *Nuclear Utility Services*, 149 Misc.2d 657, 566 N.Y.S.2d 1002, 1004-05 (Sup. 1991);

Lavelle v. Owens-Corning Fiberglass Corp., 30 Ohio Misc.2d 11, 507 N.E.2d 476, 480-81 (Ohio Com. Pl. 1987);

In re Moorenovich, 634 F.Supp. 634, 637 (D.Me. 1986);

Herber v. Johns-Manville Corp., 785 F.2d 79, 85 (CA3 1986);

Mauro v. *Owens-Corning Fiberglass Corp.*, 225 N.J.Super. 196, 542 A.2d 16, 23-24 (N.J. Super. A.D. 1988), *aff'd sub nom, Mauro* v. *Raymark Industries, Inc.*, 116 N.J. 126, 561 A.2d 257 (1989);

Sullivan v. Combustion Eng., 248 N.J.Super. 134, 590 A.2d 681, 685 (N.J.Super.A.D.), *cert. denied*, 126 N.J. 341, 598 A.2d 897 (1991).

Contaminated Water: ingestion with subcellular harm sufficient basis for recovery of emotional distress:

Werlein v. United States, 746 F.Supp. 887, 901, 906 (D.Minn. 1990);

Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1205-06 (CA6 1988);

Merry v. Westinghouse Electric Corp., 684 F.Supp. 847, 852 (M.D. Pa. 1988);

Anderson v. W.R. Grace & Co., 628 F.Supp. 1219, 1226-28 (D. Mass. 1986);

Wilson v. Key Tronic Corp., 40 Wash.App. 802, 701 P.2d 518, 524 (Wash. App. 1985);

Laxton v. Orkin Exterminating Co., Inc., 639 S.W.2d 431, 433-34 (Tenn. 1982).

Radiation: exposure to excess doses with subcellular harm sufficient basis for recovery of emotional distress:

Day v. NLO, 851 F.Supp. 869, 877-79 (S.D.Ohio 1994);

Brafford v. Susquehanna Corp., 586 F.Supp. 14, 17-18 (D.Colo. 1984).

Contact With Chemical Or Infectious Agent: physical contact causing increased risk of future disease sufficient basis for recovery of emotional distress:

Barth v. Firestone Tire & Rubber Co., 661 F.Supp. 193, 196 (N.D. Cal. 1987);

Clark v. *Taylor*, 710 F.2d 4, 14 (CA1 1983);

Wetherill v. University of Chicago, 565 F.Supp. 1553, 1559-60 (N.D. Ill. 1983);

Nesom v. *Tri Hawk Intern.*, 985 F.2d 208, 211 (CA5 1993);

Plummer v. United States, 580 F.2d 72, 75-76 (CA3 1978).

APPENDIX B

MEDICAL MONITORING ALLOWED WITHOUT PROOF OF PHYSICAL INJURY:

FELA FEDERAL COMMON LAW: *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, *modified*, 797 F.2d 256 (CA5 1986); *Buckley v. Metro-North Com. R.R.*, 79 F.3d 1337, 1346-47 (CA2 1996);

ALABAMA: Cain v. Armstrong World Indus., 785 F.Supp. 1448, 1451-52 (S.D.Ala. 1992);

ARIZONA: Burns v. Jaquays Mining Corp., 156 Ariz. 375, 377-80, 752 P.2d 28, 30-33 (Ariz.App. 1987), *review dismissed*, 162 Ariz. 186, 781 P.2d 1373 (1989);

CALIFORNIA: Potter v. Firestone Tire and Rubber Co., 6 Cal.4th 965, 863 P.2d 795, 822-23 (Cal. 1993); *Miranda* v. *Shell Oil Co.*, 17 Cal.App.4th 1651, 15 Cal.Rptr.2d 569 (Cal.App. 5 Dist. 1993);

COLORADO: Cook v. Rockwell Intern. Corp., 755 F.Supp. 1468, 1477 (D.Colo.1991);

DISTRICT OF COLUMBIA: Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824-25 (D.C. Cir. 1984);

GUAM: Abuan v. General Elec. Co., 3 F.3d 329, 331 (CA9 1993), *cert. denied*, 510 U.S. 1116 (1992);

KANSAS: Burton v. R.J. Reynolds Tobacco Co., 884 F.Supp. 1515, 1523 n. 6 (D. Kan. 1995);

KENTUCKY: Bocook v. Ashland Oil, Inc., 819 F.Supp. 530, 536-37 (S.D.W.Va. 1993);

LOUISIANA: Johnson v. Armstrong Cork Co., 645 F.Supp. 764, 769 (W.D. La. 1986);

MICHIGAN: Meyerhoff v. Turner Construction Co., 210 Mich.App. 491, 534 N.W.2d 204, 206 (1995), *appeal denied*, 550 N.W.2d 535 (1996);

MINNESOTA: Werlein v. United States, 746 F.Supp. 887, 904-05 (D.Minn.1990), *vacated in part on other grounds*, 793 F.Supp. 898 (D.Minn.1992);

MISSOURI: Elam v. Alcolac, 765 S.W.2d 42, 209 (Mo.Ct.App.1988), *cert. denied*, 493 U.S. 817 (1989); *Thomas v. FAG Bearings Corp., Inc.*, 846 F.Supp. 1400, 1404 (W.D.Mo.1994);

NEW JERSEY: Ayers v. Jackson Tp., 106 N.J. 557, 525 A.2d 287, 311-13 (N.J. 1987);

NEW YORK: Gibbs v. E.I. DuPont, De Nemours & Co., Inc., 876 F.Supp. 475, 479 (W.D.N.Y. 1995); *Gerardi* v. *Nuclear Utility Services*, 149 Misc.2d 657, 566 N.Y.S.2d 1002, 1004-05 (Sup. 1991); *Askey* v. *Occidental Chemical Corp.*, 102 A.D.2d 130, 477 N.Y.S.2d 242, 247 (A.D. 4 Dept. 1984);

OHIO: Day v. NLO, 851 F.Supp. 869, 879-81 (S.D.Ohio 1994);

PENNSYLVANIA: Simmons v. *Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232, 239 (Pa. 1996); *In re Paoli R.R. Yard PCB Litigation.*, 35 F.3d 717, 786-87 (CA3 Cir. 1994), *cert. denied*, 115 S.Ct. 1253 (1995) (*Paoli II*); *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 849-50 (CA3 1990), *cert. denied*, 499 U.S. 961 (1991) (*Paoli I*);

UTAH: Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993), *cert. denied*, 115 S.Ct. 1253 (1995);

VERMONT: Stead v. F.E. Myers Co., Div. of McNeil Corp., 785 F.Supp. 56, 57 (D.Vt.1990);

WASHINGTON: Hanford Nuclear Reserve, Litig., 780 F.Supp. 1551, 1562 (E.D.Wash. 1991);

MEDICAL MONITORING ALLOWED WITH PROOF OF PHYSICAL INJURY:

DELAWARE: Mergenthaler v. Asbestos Corp. of America, 480 A.2d 647, 651 (Del.Supr. 1984);

VIRGINIA: Ball v. Joy Technologies, Inc., 958 F.2d 36, 39 (CA4 1991) (West Virginia and Virginia law), *cert. denied*, 502 U.S. 1033 (1992);

VIRGIN ISLANDS: Purjet v. Hess Oil Virgin Islands Corp., 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1996).

Supreme Court, U.S.
FILED
FEB 7 1997
CLERK

No. 96-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Plaintiff argues that established common law limitations on recovery for emotional distress should be abandoned in this case because of Metro-North's alleged "egregious" and "outrageous" conduct. Plaintiff asks this Court to depart from the common law zone of danger test it adopted in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), and to substitute in its place a physical impact test which differs markedly from the traditional impact test under the common law. Plaintiff also would have the Court disregard the common law requirements that a plaintiff's emotional distress must be severe, result in a physical manifestation, and be established by competent medical, psychiatric, or clinical evidence.

The rule that the plaintiff asks this Court to adopt would permit untold thousands of railroad and maritime workers to file suit immediately for their concern, worry and anger if they have been exposed to any toxic substance. Thus, plaintiff asks this Court to permit the most evanescent and insubstantial claims of emotional distress to reach a jury because there may be some "impact" with a toxic substance that purportedly causes undetectable, subcellular changes, even where, as here, the plaintiff has no physical impairment and no clinical evidence of disease or exposure. Such a rule would permit almost any worker to sue, and is even broader than that suggested by the Second Circuit.

Plaintiff's invitation to this Court to create a standardless rule of recovery for fear of future injury cases under FELA should be rejected. Common law rules limiting liability for negligence cannot be abandoned, as plaintiff suggests, simply because a defendant's conduct is characterized by the plaintiff as "egregious" or "offensive." Plaintiff's reliance on intentional infliction of emotional distress and outrageous conduct cases (without indicating they are such) is misleading. This is not an intentional tort case. Rather, it is a negligence case, and Petitioner stipulated to its negligence.

The common law has always recognized that negligence claims differ substantially from claims for intentional infliction of emotional distress and that different threshold requirements apply. *See, e.g.*, Restatement (Second) of Torts § 46 (1965) (intentional, outrageous infliction of emotional distress; no requirement that the distress result in bodily harm); *id.* §§ 312, 313 (negligent infliction of emotional distress; requiring resultant bodily harm).

Moreover, contrary to plaintiff's contentions, the remedial nature of FELA is not a reason for this Court to reject established common law prerequisites to recovery for emotional distress. FELA's primary purpose is to compensate plaintiffs with legally cognizable injuries,[1] and plaintiff here does not have such an injury. As this Court recognized in *Gottshall*, common law jurisprudence continues to guard against trivial, fraudulent and unlimited claims for negligent infliction of emotional distress, and the federal common law of FELA must do so as well. *See* 512 U.S. at 557. The Court should reject the wholesale repudiation of common law principles urged by plaintiff in this case.

ARGUMENT

I. PLAINTIFF IMPROPERLY RELIES ON THE PHYSICAL IMPACT TEST

Plaintiff does not contend that he was in a "zone of danger," as that term is understood under *Gottshall* and the common law. Rather, urging that a "claim for toxic exposure is by its very nature a 'physical impact' claim," he attempts to argue that the zone of danger test adopted by this

[1] *See Gottshall*, 512 U.S. at 555 ("FELA was intended to provide *compensation* for the injuries and deaths caused by the physical dangers of railroad work . . . .") (emphasis added); S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910) (purpose of FELA was to facilitate recovery by injured railway workers).

Court in *Gottshall* "subsumes" a "physical impact" test that permits recovery regardless of whether the plaintiff was in a zone of danger of imminent physical harm. Resp. Br. at 19, 22. This argument is based on an untenable reading of *Gottshall*, in which this Court clearly explained that it was rejecting the physical impact test. *See* 512 U.S. at 556. It is based as well on a mistaken view of the common law zone of danger and physical impact tests. Indeed, while plaintiff colors his argument with repeated appeals to the common law, in fact he is asking this Court to make an extravagant departure from long-settled principles of negligence liability.

Contrary to plaintiff's claims, the physical impact test was historically confined to near-miss situations, where a plaintiff suffered fright at the apprehension of imminent physical harm. It permitted recovery by some, but not all, of the plaintiffs who would recover under a zone of danger rule. Thus, in *Porter v. Delaware, L. & W. R. Co.*, 63 A. 860 (N.J. 1906), and *Morton v. Stack*, 170 N.E. 869 (Ohio 1930), the dust-in-the-eye and smoke cases cited by plaintiff's *amici*, plaintiffs sought recovery for fright suffered in situations of imminent physical peril. In *Morton*, plaintiff was trapped in a smoke-filled burning apartment building, while in *Porter*, plaintiff was passing under a railroad bridge when it collapsed and came crashing down, showering plaintiff with debris and dust. Indeed, the early physical impact cases cited by this Court in *Gottshall*, and by Professors Prosser and Keeton in their treatise, permitted recovery where plaintiffs suffered some impact or injury while in a zone of danger.[2] These physical impact cases do not support

[2] All the early cases under the physical impact rule cited by this Court in *Gottshall*, 512 U.S. at 547 n.6, involved zone of danger type situations: *Ewing v. Pittsburgh, C., C. & St. L. Ry. Co.*, 23 A. 340 (Pa. 1892) (derailed train crashed against house); *Spade v. Lynn & B. R. Co.*, 47 N.E. 88 (Mass. 1897) (plaintiff suffered fright during disturbance in

plaintiff's claims that recovery should be allowed for persons, such as himself, who were never in a zone of danger and never feared imminent bodily injury.[3]

Moreover, as Professor Pearson has written, under the early zone of danger cases, it is evident that "not all fright is compensable, but *only* that 'which arises from a reasonable fear of *immediate* personal injury to oneself.'" Pearson,

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which conductor ejected drunken passenger); *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896) (pregnant woman nearly struck by horse-drawn streetcar). *See also Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991) (car crash); W.P. Keeton *et al.*, *Prosser & Keeton on the Law of Torts*, at 363-64 n.42-n.51 (5th ed. 1984) (citing as "slight impact" cases *Homans v. Boston Elevated Ry. Co.*, 62 N.E. 737 (Mass. 1902) (railway collision); *Hess v. Philadelphia Transp. Co.*, 56 A.2d 89 (Pa. 1948) (car hit by loose trolley wire, blinding flash); *Clark v. Choctawhatchee Elec. Co-op.*, 107 So. 2d 609 (Fla. 1958) (power line fell on gasoline station, causing blinding flash, loud report, and fire nearby); *Johnson Freight Lines v. Tallent*, 384 S.W.2d 46 (Tenn. Ct. App. 1964) (three-vehicle collision); *Boston v. Chesapeake & O. Ry. Co.*, 61 N.E.2d 326 (Ind. 1945) (plaintiff's car hit and dragged by train); *Driscoll v. Gaffey*, 92 N.E. 1010 (Mass. 1910) (blasting sent rock crashing through house); *Comstock v. Wilson*, 177 N.E. 431 (N.Y. 1931) (car collision); *Freedman v. Eastern Mass. St. Ry. Co.*, 12 N.E.2d 739 (Mass. 1938) (streetcar scraped into truck, breaking window of streetcar opposite passenger); *Zelinsky v. Chimics*, 175 A.2d 351 (Pa. Super. Ct. 1961) (car accident)).

[3] Although Professor Pearson now argues that the zone of danger test subsumes a broad physical impact test, he has criticized the expansion of the physical impact rule to permit recovery in cases not involving a near-miss accident or other traumatic event. *See* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 n.66 (1982). Professor Pearson now relies on *Christy Bros. Circus v. Turnage*, 144 S.E. 680 (Ga. Ct. App. 1928), *overruled by OB-GYN Assocs. v. Littleton*, 386 S.E.2d 146 (Ga. 1989), which he previously characterized as a "bizarre case," in which "plaintiff was able to recover even though the impact caused no harm at all, and the emotional harm did not involve fear." Pearson, *supra*, at 488 n.66.

supra, at 489 (quoting *Dulieu v. White & Sons*, 2 K.B. 669 (1901) (emphasis added)). The opinions in the early zone of danger cases do not evince any intention by the courts to subsume a rule permitting recovery when there is no threat of immediate personal injury. Thus, even assuming *arguendo* that a physical impact test "survives within the zone of danger test," as plaintiff repeatedly asserts, it is not a test that permits recovery outside the zone of danger.

Plaintiff also incorrectly contends that recent cases applying the *Gottshall* zone of danger test have "all" recognized that the physical impact test is viable under the zone of danger test. *See* Resp. Br. at 21. In fact, recent FELA cases applying the zone of danger test before and after *Gottshall* have overwhelmingly held that to recover the plaintiff must have been present in a zone of danger of *imminent* physical harm. *See* Pet. Br. at 24-25.[4]

In addition, *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *modified*, 797 F.2d 256 (5th Cir. 1986), upon which plaintiff relies extensively, does not support his position that emotional distress is actionable where a plaintiff neither has a physical injury nor meets the zone of danger test. In *Hagerty*, the court explicitly determined that the plaintiff had suffered a physical injury with physical symptoms, including dizziness and leg cramps. *See* 788 F.2d at

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[4] Plaintiff's reliance on *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 727 (1995), is misplaced because plaintiff was in a zone of danger of immediate physical injury and actually suffered such an injury. *See* Pet. Br. at 27 n.17. Plaintiff's citation to *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530 (3d Cir. 1995) (on remand), is inapposite because plaintiff there alleged that he was at risk of imminent physical harm (a heart attack) and was not allowed to recover based on his exposure to heat and sun. Nor does *Marschand v. Norfolk & Western Railway Co.*, 81 F.3d 714 (7th Cir. 1996), support plaintiff, as in that case the court refused to consider plaintiff's late-presented argument regarding the physical impact rule.

317, 318 n.1. In clarifying its original opinion on reconsideration, the Fifth Circuit disavowed *dicta* in *Hagerty* suggesting that physical injury was not a precondition to recovery for negligent infliction of emotional distress in a fact situation of exposure to potentially injurious substances. *See* 797 F.2d 256, 256 (stating that original opinion "assumed an actionable injury"). As Judge Jolly explained, under *Hagerty* as modified, to recover under the Jones Act[5] on emotional distress claims,

> a seaman must show either a traumatic event giving rise to physical or mental injury, or physical injury resulting from the incremental effect of harmful substances. The modification *eliminates the possibility that a seaman may recover for cancerphobia, without showing either physical injury or a traumatic event, simply because he served on a ship containing asbestos.*

Id. (Jolly, J., dissenting from denial of rehearing on banc) (emphasis added). Thus, under *Hagerty*, because plaintiff here can show neither a physical injury nor a traumatic event, he is barred from recovering for negligent infliction of emotional distress.[6]

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[5] The Jones Act incorporates § 1 of FELA. *See* Pet. Br. at 9 n.4.

[6] Plaintiff's reliance on two Third Circuit cases purporting to apply Pennsylvania law, *Plummer v. United States*, 580 F.2d 72 (3d Cir. 1978), and *Kahle v. Glosser Bros.*, 462 F.2d 815 (3d Cir. 1972), is misplaced because the Pennsylvania Supreme Court recently made clear that in Pennsylvania not only does the impact test not survive within the zone of danger test, but that asbestos exposure without resulting physical injury does not support a claim for negligent infliction of emotional distress. *See Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 n.8 (Pa. 1996); *Gregorio v. Zeluck*, 678 A.2d 810 (Pa. Super. Ct. 1996) (relying on *Simmons*, holding that in non-zone of danger case "plaintiff must demonstrate some type of physical injury," not merely physical impact,

Moreover, restricting recovery to persons in a zone of danger of immediate physical injury, as opposed to persons such as plaintiff who claim that they have emotional distress because of the possibility of some future harm, is not arbitrary line-drawing. The courts that created the zone of danger test at the end of the last century recognized that as a factual matter fright and shock suffered in a near-miss situation of immediate physical peril were likely to produce severe mental and physical injuries. *See, e.g., Mack v. South Bound R.R. Co.*, 29 S.E. 905, 906 (S.C. 1898) (fright could cause mental suffering, serious injury to nervous system, and incapacitation for normal duties of life); *Pankopf v. Hinkley*, 123 N.W. 625, 626 (Wis. 1909) ("imminent apparent danger of injury or death" may result in permanent physical and mental injuries); *Stewart v. Arkansas S. R. Co.*, 36 So. 676, 677 (La. 1904) (sudden and extreme fright can cause nervous disease, miscarriage, and insanity).

The recognition in the early zone of danger cases of the serious consequences of fright and shock in near miss situations is confirmed by modern psychiatric authorities on post-traumatic stress disorder. The American Psychiatric Association's authoritative manual on mental disorders describes post-traumatic stress disorder as

> the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to

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to recover for emotional distress), *appeal denied*, __ A.2d __ (Pa. Dec. 5, 1996). *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991), also cited by plaintiff, is inapposite because it involved a malpractice claim against a psychiatrist who had sexual relations with a patient and was neither an impact nor zone of danger case, but was based on a distinction between "direct" victims and bystanders, which has no parallel under *Gottshall*.

> one's physical integrity . . . . The person's response to the event must involve intense fear, helplessness, or horror. . . . [T]he disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Diagnostic and Statistical Manual of Mental Disorders 424 (4th ed. 1994) ("*DSM-IV*"); *see also Harrison's Principles of Internal Medicine* 2411 (13th ed. 1994) (patients with post-traumatic stress disorder "have experienced a severe catastrophic event that is outside the range of normal human experience"). *DSM-IV* lists accidents and natural and man-made disasters among the traumatic events that may precipitate post-traumatic stress disorder. *See DSM-IV* at 424. It does not indicate that knowledge that one has been exposed to a potentially harmful substance such as asbestos is likely to give rise to any comparable emotional injury. Moreover, plaintiff and his *amici* do not cite any scientific research, or any authority of any kind, showing that knowledge that one has been exposed to asbestos is likely to be attended by the kind of serious emotional injury that results from near-miss situations. Instead, plaintiff asks for an unprecedented rule of law that would permit recovery for non-severe emotional distress.

Plaintiff is asking this Court to apply in toxic exposure cases a "threshold" test, not limited by the factual parameters of a zone of danger, that allows a plaintiff with no physical injury and no clinical evidence of disease or even of exposure to sue for anger and fear of cancer, even though the anger and fear are not "severe" by any definition. The "heavy burden" that plaintiff contends exists under the approach he urges is illusory. *See* Resp. Br. at 42. Under plaintiff's "threshold" test, the claims of every plaintiff who has had an encounter with a potentially harmful substance (whether or not any illness or impairment results) will go to

the jury. The only apparent limitation is that plaintiff find an expert to state that his exposure amounts to an "impact" and that a "reasonable" person could fear the possibility of disease from such an impact. Such expert testimony need be based not upon the plaintiff's own medical records, but, as is the case here, upon a theoretical description of "subcellular" changes that may or may not be occurring.[7] This is no limitation or "threshold" at all. As courts have come to recognize in this age of the professional witness, "[t]here is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" *Albers v. Church of the Nazarene*, 698 F.2d 852, 858 (7th Cir. 1983) (citation omitted); *see also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995) ("Professional expert witnesses are available to render an opinion on almost any theory, regardless of its merit.").

More than 190 carcinogenic or probable carcinogenic substances have been identified,[8] and countless people are exposed to such substances in the workplace every day, most of whom have no adverse health consequences and will have none. Under plaintiff's "threshold" test, any such person who wishes to sue for negligent infliction of emotional distress will have his day in court. Allowing such claims would result in a flood of litigation that could overwhelm the court system as well as devastate defendants. None of plaintiff's arguments justify opening such a gaping loophole

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[7] *See Eagle-Picher Indus. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 19 & n.3 (1st Cir. 1982) (discussing "fiction that bodily injury is contemporaneous with exposure to asbestos" and noting that "the body's natural mechanisms may remove the fibers before they become embedded in the lungs"), *cert. denied*, 460 U.S. 1028 (1983); *see also* Owens Illinois Amicus Br. at 10-11.

[8] *See* U.S. Department of Health and Human Services, National Toxicology Program, *7th Annual Report on Carcinogens* (1994).

into the carefully confined limits of the zone of danger test adopted by this Court in *Gottshall*.

II. THE *SCHWEITZER* RULE REQUIRING PHYSICAL INJURY GOVERNS THIS CASE

Notwithstanding the Second Circuit's acknowledgement that its opinion is directly contrary to *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), plaintiff argues that *Schweitzer* is inapplicable to this emotional distress case because *Schweitzer* was a physical injury case. *See* Resp. Br. at 30-32. Contrary to plaintiff's assertions, the *Schweitzer* rule that a plaintiff exposed to asbestos has no cause of action until he develops an asbestos-related disease properly governs this emotional distress case. Under *Gottshall*, claims for emotional distress, in the absence of physical injury, are cognizable only when they meet the zone of danger test. Because this asbestos exposure case does not meet the zone of danger test, the fact that under *Schweitzer* plaintiff has no physical injury is, as a matter of law, dispositive of his emotional distress claims. *See* Pet. Br. at 9, 21-28.

Plaintiff also incorrectly asserts that *Schweitzer* is inapplicable because it was a bankruptcy case. However, in order to resolve the bankruptcy issues in that case, the *Schweitzer* court had to determine, based on "generally applicable principles of tort law," when an asbestos claimant has a cognizable injury under FELA. 758 F.2d at 941-42. Indeed, the *Schweitzer* rule that an asbestos plaintiff has no cause of action until he manifests an asbestos-related disease has been repeatedly followed in non-bankruptcy cases involving emotional distress claims. *See* Pet. Br. at 10-12.[9]

[9] The asbestos exposure cases cited in Appendix A to plaintiff's brief do not support his position. In all but two of those cases, plaintiffs, unlike plaintiff here, had asbestosis or pleural plaques. Moreover, those two cases are of dubious authority. *Gerardi v. Nuclear Util. Servs.*, 566 N.Y.S.2d 1002 (Sup. Ct. 1991), a trial court decision, has been superseded by *Doner v. Ed Adams Contracting Inc.*, 617 N.Y.S.2d 565 (App. Div. 1994), which denied emotional distress recovery in the absence of asbestos-related injury. *In re Moorenovich*, 634 F. Supp. 634 (D. Me. 1986) (Maine law), is of doubtful validity in light of *Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986) (following *Schweitzer*).

In addition, plaintiff claims that whenever a defendant owes and breaches a direct duty to plaintiff, the plaintiff may recover for emotional distress without a showing of physical injury or physical manifestation of distress. *See* Resp. Br. at 27-28. This proposition, for which plaintiff cites no FELA cases, has been applied in cases where a physician negligently misdiagnosed a plaintiff with a disease such as AIDS or syphilis, causing distress to plaintiff and family. *See, e.g., Chizmar v. Mackie*, 896 P.2d 196, 205 (Alaska 1995); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 817-21 (Cal. 1980) (in bank).[10] These cases offer no support for altering the standards for recovery under FELA. Indeed, every FELA employer owes his employees a duty. *See Gottshall*, 512 U.S. at 550. Therefore, under the rule proposed by plaintiff, every claim for negligent infliction of emotional distress would be cognizable with or without a physical injury and with or without presence in a zone of

[10] Plaintiff cites two exposure cases on this point, one of which, *Gerardi*, is not good law, *see* n.9 *supra*, the other of which, *Campbell v. A.C. Equip. Servs. Corp.*, 610 N.E.2d 745 (Ill. Ct. App. 1993), did not allow recovery. Plaintiff's other cases are not zone of danger cases, involve factually inapposite situations, and shed no light on proper standards for recovery under FELA: *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (boyfriend surreptitiously videotaped girlfriend); *Jacoves v. United Merchandising Corp.*, 11 Cal. Rptr. 2d 468 (Ct. App. 1992) (parents sued hospital and gun store for distress caused by son's suicide); *Oswald v. LeGrand*, 453 N.W.2d 634 (Iowa 1990) (medical malpractice case involving miscarriage); *Mortise v. United States*, 102 F.3d 693 (2d Cir. 1996) (no recovery for couple captured in National Guard war games).

danger. Thus, the rule plaintiff proposes and the cases he cites are incompatible with both *Gottshall* and *Schweitzer*.

As discussed in Metro-North's Brief at 18-20, the *Schweitzer* rule accommodates the policies that underlie the statute of limitations, the discovery rule, and the single recovery rule, thus protecting the interests of both plaintiffs and defendants.[11] Plaintiff incorrectly asserts that the cases cited by Metro-North regarding the single recovery rule are inapposite because they concerned the right of a widow to bring a claim under FELA after the employee had already recovered for the underlying injury. *See* Resp. Br. at 38 n.17. Contrary to plaintiff's assertion, these cases are based upon the principle that under FELA a plaintiff may have only one recovery based upon a single incident or wrong. *See Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931) (under FELA, a widow's right of action was "dependent upon the continuance of a right in the injured employee at the time of his death"; therefore, "an effective release by the employee makes it impossible for his administrator to recover"). Furthermore, in construing section 1 of FELA in Jones Act cases, courts have recognized that the single recovery rule applies. *See Hicks v. Hines Inc.*, 826 F.2d 1543 (6th Cir. 1987) (under Jones Act, single cause of action for all injuries resulting from exposure to toxic chemical accrued upon discovery of first injury (eye problems); no separate cause of action for later bladder cancer); *Hagerty*, 788 F.2d at 316-17 (under Jones Act, plaintiff with physical

[11] Plaintiff's contention that the issue of claim-splitting is not properly before this Court is incorrect. Metro-North is not raising a new issue for this Court to decide, *i.e.*, whether some future claim by plaintiff would be barred under the single recovery rule. Rather, the single recovery rule under FELA and the policy considerations underlying it are relevant to and should inform the resolution of issues indisputably before this Court, in particular the application of the *Schweitzer* rule to this case.

injury after chemical drenching could sue only once for all injuries present and future; no separate disease rule applies).

Thus, under the law as it currently exists, the single recovery rule applies in FELA litigation. As discussed in Metro-North's Brief at 18-20, the *Schweitzer* rule postponing recovery until an asbestos-related physical injury develops would preserve a plaintiff's emotional distress claims until that time and would obviate potential problems under both the statute of limitations and the single recovery rule. Moreover, in contrast to the physical impact test urged by plaintiff, the *Schweitzer* physical injury requirement functions in exposure cases as a true threshold test, allowing courts to winnow out emotional distress claims that are unripe or insubstantial and thereby preventing a flood of claims that could overwhelm judicial resources and devastate defendants.

III. THE COMMON LAW REQUIREMENTS OF SEVERITY, PHYSICAL MANIFESTATION, AND MEDICAL OR PSYCHIATRIC EVIDENCE ARE APPLICABLE IN ZONE OF DANGER CASES

Plaintiff and his *amici* incorrectly claim that Metro-North seeks to engraft on the zone of danger test new and additional requirements: severity, physical manifestation, and competent medical or psychiatric evidence of distress. *See* Resp. Br. at 25-30. Contrary to plaintiff's claims, the principle is universally accepted in negligent infliction of emotional distress cases that only *severe* emotional distress is compensable, under whatever threshold test is applied, including the zone of danger test. *See* Pet. Br. at 37-40. Moreover, zone of danger cases have required that a plaintiff's emotional distress result in physical manifestations, *see, e.g., Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534, 536 (Minn. Ct. App. 1994); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va.

1973),[12] and have required competent medical or psychiatric evidence to establish compensable emotional distress. *See Vance v. Consolidated Rail Corp.*, 652 N.E.2d 776, 784 (Ohio 1995), *cert. denied*, 116 S. Ct. 776 (1996).

The cases cited by plaintiff and his *amici* do not support their contention that non-severe emotional distress is a compensable injury. In *Marriott v. Sedco Forex International Resources, Ltd.*, the parties in fact "stipulated that [the plaintiff] had suffered 'severe emotional distress.'" 827 F. Supp. 59, 72 & n.18 (D. Mass. 1993). In *Anselmi v. Penrod Drilling Corp.*, where plaintiff had been diagnosed with post-traumatic stress disorder requiring hospitalization and prescriptive medications, and was unable to work, the court noted that "the defendant does not dispute that [plaintiff] appears to have suffered severe emotional distress." 813 F. Supp. 436, 442 (E.D. La. 1993). In *Hagerty*, the court specifically stated a rule of law that permits recovery for "serious mental distress." *See* 788 F.2d at 318. Moreover, in *Gates v. Richardson*, the court rejected a separate requirement of proof of the seriousness of emotional distress in relative bystander cases because the court believed that the specific circumstances required for recovery, namely, witnessing a close relative killed or gravely injured in a serious accident, in and of themselves guarantee genuine severe shock and distress. *See* 719 P.2d 193, 200-01 (Wyo. 1986).

Furthermore, plaintiff's repeated contention that the circumstances of this asbestos exposure case guarantee the "genuineness" of his distress is precisely the type of approach that was rejected by this Court in *Gottshall*, because

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[12] *See also* Douglas Bryan Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices*, 33 Vill. L. Rev. 781, 796 (1988) ("[A] large number of jurisdictions follow a combination of both the zone of danger and physical manifestation tests . . . ."); *Gottshall*, 512 U.S. at 549 n.11.

it improperly disregarded the common law limits placed on recovery for negligent infliction of emotional distress. *See* 512 U.S. at 550-52. Indeed, if exposure to asbestos, even significant exposure to asbestos, were found to guarantee the genuineness of a plaintiff's emotional distress, more than 21 million Americans would have a cause of action for the negligent infliction of emotional distress. *See* Pet. Br. at 17. However, far from accepting asbestos exposure as a circumstance guaranteeing the genuineness of distress, courts have held that as a matter of law fear of disease arising from asbestos exposure is not reasonable and therefore not compensable in the absence of an existing asbestos-related physical injury. In *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1570 (D. Haw. 1990), the court explained that such fear is not reasonable given "that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer."[13] Notably, in *Ironbound Health Rights Advisory Commission v. Diamond Shamrock Chemicals Co.*, 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990), the court rejected, for reasons equally applicable here, emotional distress claims of plaintiffs alleging exposure to a toxic substance (dioxin) but no existing physical injury. The court explained:

> [Plaintiffs'] claimed emotional distress is the fear that they might some day become seriously ill from the previous inhalation and absorption of dioxin. They are apprehensive.

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[13] *Accord Doner*, 617 N.Y.S.2d at 566 (dismissing emotional distress claims because fear of cancer based on exposure to asbestos with no resulting physical ailment is not reasonable); *cf. Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993) (in bank) (requiring plaintiffs with no physical injury to prove that they more likely than not would develop cancer as precondition to recovery for emotional distress).

> Their concerns may be understandable but they are not compensable.

Id. at 1249-50.

In sum, plaintiff's claim that non-severe emotional distress is compensable simply because it is based on a "physical impact" consisting of workplace exposure to asbestos is not supported by the case law or by the policies identified by this Court in *Gottshall*.

IV. PLAINTIFF HAS NOT SUSTAINED "BODILY HARM"

Plaintiff argues that, although he has no "physical injury," he has "bodily harm," which justifies recovery of damages for non-severe emotional distress. *See* Resp. Br. at 23-24. The authorities cited by plaintiff do not support his false distinction between bodily harm and physical injury.[14] Other than the Second Circuit, no court, even those cited by plaintiff, has allowed damages for non-severe emotional distress unless such damages flow from a cognizable physical injury or another independent tort.

Plaintiff incorrectly relies upon the Restatement (Second) of Torts to argue that he has suffered "bodily harm." Under the Restatement, "bodily harm" is defined as a "physical *impairment* of the condition of another's body, or physical pain or illness." Restatement § 15 (emphasis added). As used in the Restatement, the term "'[h]arm' implies a loss or detri-

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[14] Plaintiff seems to suggest that "bodily harm" is some lesser degree of harm than a "physical injury." The difference between the two terms as they are used in the Restatement (Second) of Torts is that "physical injury" is a legal term, whereas "bodily harm" is a factual term. *See* Restatement § 7. Section 924 of the Restatement, relied on by plaintiff, does not purport to change the basic rule of tort law that a plaintiff may not recover damages in the absence of an injury. *See id.* § 902 & cmt. a ("Damages flow from an injury.").

ment." *Id.* § 7 cmt. b. Only a physical change that is detrimental constitutes a bodily harm. *Id.*

Comment a to section 15 of the Restatement does not support plaintiff's position. Plaintiff gives the following partial quotation from comment a: "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." Resp. Br. at 24. Yet, the full context of comment a makes clear that the quoted sentence applies "only in the context of an action based on the intentional tort of battery." *Owens-Illinois v. Armstrong*, 591 A.2d 544, 561 (Md. Ct. Spec. App. 1991), *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md.), *cert. denied*, 506 U.S. 871 (1992).[15] Thus, in *Armstrong*, the court determined that comment a was inapplicable to situations of claimed bodily harm from asbestos exposure and held that pleural plaques or thickening was not bodily harm in the absence of an objectively verifiable functional impairment. *See* 591 A.2d at 561.[16]

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[15] Similarly, plaintiff incorrectly relies on section 46 of the Restatement, which also by its terms applies only to intentional infliction of emotional distress or the tort of outrage and is not applicable to plaintiff's claims of negligent infliction of emotional distress.

[16] Many other courts have also held that pleural plaques and subclinical changes do not constitute compensable bodily injuries. *See* Pet. Br. at 45. Moreover, contrary to plaintiff's claims, both *Amendola v. Kansas City Southern Railway Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988), and *Sullivan v. Combustion Engineering*, 590 A.2d 681 (N.J. Super. Ct. App. Div.), *cert. denied*, 598 A.2d 897 (N.J. 1991), support Metro-North's position. In *Sullivan*, plaintiff had pleural thickening, a condition that the court distinguished from a lack of any "manifestation of injury" as in *Schweitzer* (and as in the present case). *See* 590 A.2d at 684-85. In *Amendola*, the court specifically found that the inhalation of asbestos fibers was not a "physical harm" that would allow plaintiffs to recover for emotional distress. 699 F. Supp. at 1403 n.3, 1410-11. *Amendola* does not support plaintiff's concocted distinction between physical injury

Under these principles, it is clear that plaintiff has sustained no bodily harm. X-rays of his lungs show no pleural plaques or thickening and no traces or effects whatsoever of asbestos exposure, much less actual physical injury. (JA 73-74) Indeed, if plaintiff's medical records contained any evidence of an objectively verifiable functional impairment, he would have an old-fashioned personal injury claim, and there would be no need to talk about a zone of danger test, physical impact, or the like.

V. FELA FORBIDS MEDICAL MONITORING DAMAGES ABSENT PRESENT INJURY

In support of his claim for medical monitoring damages, plaintiff incorrectly asserts that FELA's statutory term "injury" should be understood to mean any invasion of a legally protected interest.[17] Notably, none of the medical monitoring cases cited by plaintiff address a statutory injury requirement comparable to that of FELA *See* Resp. Br. at 44. Not only the wording of FELA ("injury or death"), but also FELA's legislative history and its interpretation by this Court indicate that the term "injury" as used in the statute requires personal injury, either physical or emotional. *See* House Judicial Committee Rep., H.R. Rep No. 1386, 60th Cong., 1st Sess. 1 (1908) ("Sections 1 and 2 of [FELA] provide that common carriers . . . shall be liable to its employees for *personal injuries* resulting from its negli-

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and physical harm; the only distinction made by *Amendola* was between physical injury or harm *causing* emotional distress and *resulting from* emotional distress. In addition, the determination of "bodily harm" in the insurance coverage cases cited by plaintiff (Resp. Br. at 24 n.11) is irrelevant to whether compensable injury exists under tort law. *See Schweitzer*, 758 F.2d at 942.

[17] Plaintiff has no present physical injury, and his alleged emotional injury cannot serve as the basis for the medical monitoring damages he seeks. *See* Pet. Br. at 46-47.

gence") (emphasis added); *Gottshall*, 512 U.S. at 542 (stating that "[o]ur task today is determining under what circumstances emotional distress may constitute 'injury' resulting from 'negligence' for purposes of the statute" and noting that when Congress enacted FELA, "its 'attention was focused primarily upon injuries and death resulting from accidents'") (citation omitted).[18] This Court's cautious approach to defining "injury" under FELA is illustrated not only by the Court's opinion in *Gottshall*, but also the Court's painstaking analysis in *Urie v. Thompson* of whether the term "injury" included occupational diseases as well as physical injuries resulting from accidents. *See* 337 U.S. 163, 180-87 (1949).

Clearly, in enacting FELA, Congress did not authorize medical monitoring damages where, as here, plaintiff has no present cognizable "injury."[19] Indeed, where Congress has desired to provide medical monitoring, it has expressly done so through statutory and regulatory programs. For example, OSHA (which is applicable to Metro-North through New

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[18] *See also Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281 (9th Cir. 1986) (FELA does not afford a cause of action for wrongful discharge and similar employment-related claims).

[19] Moreover, the validity of the Third Circuit's decisions in *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991), and 35 F.3d 717 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995), upon which plaintiff relies, has been severely undermined. *See* Pet. Br. at 46. Furthermore, many of the medical monitoring cases listed in Appendix B to plaintiff's brief are improperly cited. For example, in *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995), *Cain v. Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992), *Johnson v. Armstrong Cork Co.*, 645 F. Supp. 764 (W.D. La. 1986), and *Hagerty*, the plaintiffs all alleged present physical injuries. *Simmons* does not support a claim for medical monitoring absent a demonstrable physical symptom such as pleural thickening. *See* Pet. Br. at 46 n.28. *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994), in fact expressly "requires plaintiff to prove actual present injury" to receive future medical monitoring costs.

York state law[20] and applies to many other FELA employers as well) directs the Secretary of Labor to require medical monitoring where appropriate. *See* 29 U.S.C. § 655(b)(7). OSHA regulations promulgated pursuant to such authority require employers to implement medical monitoring of asbestos-exposed workers under precisely defined circumstances. *See* 29 CFR §§ 1910.1001(*l*), 1926.1101(m). Significantly, neither under OSHA nor other legislation has Congress seen fit to make medical monitoring damages available as part of a statutory system of tort recovery, subject to all the attendant uncertainties and transactional costs of litigation. *Cf. Jones v. Utilities Painting Corp.*, 603 N.Y.S.2d 546, 546 (App. Div. 1993) (taking judicial notice of medical monitoring for asbestos exposure provided under OSHA and dismissing tort claims for medical monitoring), *appeal denied*, 633 N.E.2d 489 (N.Y. 1994).

CONCLUSION

The Court should reverse the Second Circuit's decision in this case and reinstate the directed verdict entered by the district court in favor of Metro-North.

Respectfully submitted,

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[20] New York has adopted OSHA standards and regulations with regard to public employees, including employees of public authorities such as Metro-North, pursuant to N.Y. Lab. Law § 27-a(3)(c) (McKinney 1986) and § 18(b) of OSHA, 29 U.S.C. § 667(b).

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

(12)

No. 96-320

IN THE
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OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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36pp

QUESTION PRESENTED

May mere exposure to a potentially harmful substance, in the absence of any physical injury or even symptom, be a sufficient basis for recovery under the Federal Employers' Liability Act?

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all fifty states. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees,

and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994); *Burlington Northern Railroad Co. v. Ford,* 112 S.Ct. 2184 (1992); *TXO Production Corp. v. Alliance Resources Corp.,* 113 S. Ct. 2711 (1992).

WLF believes that the decision below in this case is a radical departure from the common law of tort liability and the law of liability under the Federal Employers' Liability Act (FELA). If left intact, this decision will impose significant costs on all businesses, both within the FELA context and without. These increased costs will ultimately be borne by consumers, workers, and society as a whole. WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF is filing this brief with the consent of Petitioner and Respondent. Consent letters have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The decision below improperly permitted a plaintiff, who manifests no physical effect whatsoever from exposure to asbestos, to assert a claim under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, for negligent infliction of emotional distress based on his general, non-severe anxiety regarding his future health. This ruling is directly contrary to the holding of this Court in *Consolidated Rail Corp. v. Gottshall,* 114 S.Ct. 2396 (1994), is contrary to the overwhelming weight of common law authority in the area, and represents a radical expansion of tort liability.

In *Gottshall*, this Court recognized only a single, narrow exception to the general requirement that emotional distress must be accompanied by an underlying physical injury to be compensable. The "zone of danger" exception articulated by the Court in *Gottshall*, simply does not apply in the context of the instant case and was misapplied by the Second Circuit. Instead, this case much more closely parallels the claim asserted in the companion case, *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90 (3d Cir. 1990), which was rejected outright by this Court in *Gottshall*. There, this Court held that an employee's anticipatory, wholly speculative fear of physical injury cannot support a cognizable claim under FELA.

This limitation on liability for negligently-inflicted emotional distress is supported by sound policy concerns. Potential liability for mental distress claims of the sort asserted by petitioner would be far too vast, and their incidence much too unpredictable. In the particular context of asbestos litigation, allowing claims based solely on emotional distress may exhaust the available resources of asbestos defendants and severely prejudice those who actually develop debilitating asbestos-related disease. If the doors of the courthouse are thrown open wide enough to admit those that do not yet have *any* physical effect of their exposure, there may be little or no monies remaining for those that become diseased several years down the road.

Finally, contrary to the assertions of Respondent, this case is not unique and the application of the decision handed down by this Court will not be limited solely to a few FELA plaintiffs asserting claims for asbestos exposure. Rather, this Court's decision will determine whether a defendant can be liable, based on simple negligent conduct, for the emotional

distress that an individual may develop because of any increased exposure to a harmful substance.

In short, the Second Circuit's decision is a significant and troubling one that is directly contrary to existing authority and will have far-reaching effects if it is upheld. For these reasons and the reasons set forth below, the Washington Legal Foundation (WLF) respectfully urges this Court to reverse the decision below.

ARGUMENT

I. THE MENTAL DISTRESS COMPLAINED OF CANNOT SUPPORT A CAUSE OF ACTION UNDER FELA OR THE COMMON LAW

The mental distress asserted by Buckley -- general, non-severe worry regarding potential future illness because of his exposure to asbestos while on the job -- cannot support a cause of action under the Federal Employers' Liability Act or the applicable common law. This Court's decision in *Consolidated Rail Corp. v. Gottshall,* 114 S. Ct. 2396 (1994), and numerous decisions of lower courts dealing with asbestos exposure, make clear that an employee may not recover solely for "fear" of developing a future illness unless and until he has some physical injury because of the exposure. Simply put, general free-floating anxiety regarding the possibility of a speculative future injury, unconnected with any current physical symptoms of such an injury, is not compensable under FELA or the common law from which FELA gleans its liability standards.

A. This Court's Decision in *Gottshall* Establishes That Buckley Cannot State A Claim Solely For His Anxiety Over A Speculative, Future Injury

In *Gottshall*, this Court first considered "under what circumstances emotional distress may constitute `injury' resulting from `negligence' for purposes of the [FELA] statute." 114 S. Ct. at 2403.[1] The Court had before it in *Gottshall* two consolidated claims for negligent infliction of emotional distress. One derived from an alleged on-going program of stressful and dangerous working conditions that led to an employee's mental breakdown, and the other arose out of a specific, harrowing incident in which a worker collapsed and died causing severe fright and long-term trauma to a co-worker who witnessed the death. The underlying decisions of the Third Circuit had found both claims to be compensable because the mental distress was "genuine and serious" and was a foreseeable outcome of the employers' negligent actions. *Gottshall,* 114 S.Ct. at 2408.

This Court rejected the lower court's analysis as unworkable and unsupported by the common law. While this Court found for the first time that a claim of negligent infliction of emotional distress could be asserted under FELA, it recognized the very real dangers inherent in such a cause of action. According to this Court, claims of negligent infliction of emotional distress must be strictly limited for two important reasons -- the potential for fraudulent and trivial

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[1] Section 1 of FELA provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51.

claims and the prospect of "unpredictable and nearly infinite liability for defendants." *Id.* Focusing on the latter consideration, this Court emphasized that the "genuineness" test articulated by the Third Circuit would provide employers with "no standard against which to regulate their conduct," 114 S. Ct. at 2409, and would subject employers to liability essentially any time an employee had an adverse emotional response to an employer's negligent action. Because the only check on liability would be the severity of the employee's reaction, courts "would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts." *Id.* This approach would lead to unacceptable *ad hoc* decision-making and would cast the net of employer liability far too broadly.

This Court then reversed the Third Circuit and established a far narrower test for determining when a plaintiff may pursue a claim under FELA *solely* for emotional harm without any accompanying physical injury. The Court adopted the "zone of danger" test, holding that the sole exception to the general rule that emotional harm is compensable only when linked to a physical injury is where the employee -- although in fact unhurt physically -- was within the immediate vicinity of an accident or incident and was threatened with imminent physical injury. In other words, where a ceiling collapses due to negligence, it will be no defense to liability if the employee standing under it was able to leap to safety at the last moment and avoid physical injury. 114 S. Ct. at 2406, 2410.

In restricting valid claims for negligent infliction of emotional distress in this manner, this Court explicitly recognized that certain individuals who suffered real and

severe emotional harm would not be entitled to recover under the law. *Gottshall*, 114 S. Ct. at 2411. This Court reasoned that numerous important policy concerns, including "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability," argue against providing a cause of action for all persons who have suffered emotional harm due to their employers' negligent actions. *Id.*

Contrary to the Second Circuit's conclusion in the instant case, the zone of danger exception provides no basis for Mr. Buckley to recover here. Indeed, none of the traditional elements of the zone of danger test is present where a plaintiff is seeking to recover for the increased anxiety he feels because of exposure to a potentially dangerous agent, such as asbestos. There was no accident or singular traumatic event here. Mr. Buckley is not in any imminent danger of developing a physical disease or impairment; indeed, his general anxiety is the result of his inability to determine for as many as twenty to thirty years whether he has been harmed in any way by his exposure. Finally, Mr. Buckley does not allege that he suffered a severe fright that led to emotional injury. *See Gottshall,* 114 S. Ct at 2406, 2410-11 (discussing traditional elements of zone of danger test and citing cases).[2]

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[2] Indeed, Mr. Buckley appears explicitly to concede in his opposition to the writ of certiorari that his emotional reaction to his exposure has not been "severe," *see* Respondent's Brief In Opposition to the Petition for Writ of Certiorari at 14-17, and asserts only that he has "an appropriate level of distress," *id.* at 5, because of his employer's negligent action. This failure to even allege, let alone establish, an acute emotional reaction to his exposure to asbestos removes Mr. Buckley from the zone of danger paradigm and bars his recovery.

Rather, Mr. Buckley's claim is more akin to the claim pursued by the companion plaintiff, Mr. Carlisle, which this Court dismissed outright in the *Gottshall* decision. Mr. Carlisle was a train dispatcher who alleged that the dangerous working conditions that Conrail imposed upon him -- including requiring him to rely on outdated and unsafe equipment, demanding that he work long and arduous shifts, and subjecting him to the supervision of an alcoholic boss -- caused him to suffer severe emotional distress. *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 92-93 (3d Cir. 1993); *see also Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 914 (3d Cir. 1994) (describing the cause of Mr. Carlisle's stress as the pressure "to achieve on-time performance" and "to ignore safety concerns that would slow the movement of trains"). This Court overturned the Third Circuit and directed that judgment be entered against Mr. Carlisle. In doing so, this Court reasoned that such a claim "plainly does not fall within the common law's conception of the zone of danger," and ruled that FELA does not provide any remedy for work-related stress arising from unsafe or arduous working conditions. *Gottshall,* 114 S. Ct. at 2411-12.

Mr. Buckley's claim is similar to that of Mr. Carlisle. Mr. Buckley claims that the unsafe working conditions negligently created by Metro-North, i.e., the failure to protect him adequately against asbestos exposure, have caused him to fear that he may develop cancer or another physical impairment at some point in the future. Mr. Carlisle's claim was closely analogous. Mr. Carlisle claimed that the unsafe conditions under which he was forced to work made him fearful and overwrought. More specifically, he alleged that the dangerous working conditions negligently created by his employer caused him to be afraid that he would someday harm himself severely in performing his job duties or that he

would cause injury to passengers or freight at some future time. According to Mr. Carlisle, the stress of this fear ultimately led to a mental breakdown. In rejecting Mr. Carlisle's claim, this Court concluded that this sort of generalized worry about possible future harms, even where the emotional distress it caused was severe, can not support a cause of action under FELA.

The logic of the *Gottshall* decision regarding Mr. Carlisle's claim dooms Mr. Buckley's claim and demonstrates the fallacy of the Second Circuit's decision here. Certainly, if a negligently unsafe aspect of Mr. Carlisle's job had *actually* resulted in physical injury to him, he would have been entitled to assert a claim against Conrail for his physical injuries and any accompanying emotional distress. Prior to any such injury, however, his anticipatory concern regarding safety issues, no matter what emotional trauma it may have led to, was not a compensable injury under FELA or the common law.

Analogously, on the facts of this case, if Mr. Buckley, in fact, suffers a physical impairment as a result of his exposure to asbestos, he will be allowed to pursue a claim for that physical injury and the accompanying, if any, emotional distress. In this way, Mr. Buckley will not be deprived of a remedy in the admittedly unlikely event that he should develop an asbestos-related impairment at some time in the future. *See Simmons v. Pacor*, 674 A.2d 232 (Pa. 1996) ("Appellants are not left without a remedy for their mental anguish. . . [They can bring an action] if cancer develops. It is in this action that Appellants can assert their emotional distress or mental anguish claims."). Until such time as Mr. Buckley develops any such physical impairment, however, his

anxiety is wholly speculative and cannot support a claim under FELA.

B. The Lower Courts Have Consistently Rejected, Both in the FELA and Common Law Contexts, The Speculative Claim Asserted By Mr. Buckley

The Second Circuit's decision below is at odds with most, if not all, of the lower court decisions to consider the type of claim presented here. In numerous recent, well-reasoned opinions, the courts dealing with asbestos and other toxic tort litigation have rejected claims for emotional distress based solely on exposure and fear of potential future injury.

For example, United States District Judge Charles Weiner, who presides over the federal multi district asbestos personal injury litigation, recently dismissed the claims of a group of plaintiffs that alleged emotional distress from exposure only without any physical injury. Following the reasoning of the Pennsylvania Supreme Court in *Simmons*, 674 A.2d at 238, which distinguished between the concepts of "physical impact" and a "physical injury," Judge Weiner held that the inhalation of asbestos fibers was not a compensable physical injury. *In re Asbestos Prods. Liab. Litig. (No. VI)*, CA No.2 MDL 875, 1996 WL 239863, at *14-15 (E.D. Pa. May 2, 1996) (discussing both FELA and Jones Act claims). According to Judge Weiner and the Pennsylvania Supreme Court, even assuming that the inhalation of asbestos fibers could be characterized as a physical impact or injury, it was not sufficient standing alone to support a tort action for emotional harm. "[P]hysical injury sufficient to maintain a tort action must be accompanied by *harm*," by which the court plainly meant *physical* harm. *Id.* (emphasis added); *see Simmons*, 674 A.2d at 238 (asymptomatic pleural thickening

is not sufficient physical injury to allow recovery of emotional distress damages).[3] Without any accompanying physical *harm*, the metaphysical physical impact or injury caused by the inhalation or ingestion of a substance does not support an independent tort action for emotional distress.

Numerous other courts have reached the same conclusion in a variety of contexts. *See, e.g., Redland Soccer Club v. Dept. Of Army*, 55 F.3d 827, 846 (3rd Cir. 1995) (affirming dismissal of homeowners' claims for emotional distress caused by exposure, through ingestion and inhalation, to allegedly contaminated field because no plaintiff had any physical injury from exposure); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 38 (4th Cir.) *cert. denied*, 502 U.S. 1033 (1992) ("mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle plaintiffs to recover for their emotional distress"); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (1990) (requiring underlying compensable harm such as some functional impairment from asbestos exposure before recovery may be had for mental anguish); *Bondy v. Texas Eastern Transmission* Corp., 701 F. Supp. 112, 114 (M.D. La. 1988),

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[3] The Pennsylvania Supreme Court specifically rejected the argument advanced by Mr. Buckley here:

> We decline to adopt Appellants' view that the pleural thickening establishes a sufficient "impact" to warrant recovery for mental anguish. Those cases which base recovery on an "impact" rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to a close family member. The instant circumstances are not analogous since we have held that no physical injury to any party has been established.

Simmons, 674 A.2d at 238 (citations omitted).

aff'd, 872 F.2d 422 (5th Cir. 1989) (requiring PCB-related physical injury before plaintiff may recover for mental anguish arising from exposure to PCBs); *Fontroy v. Owens*, CA No. 86-4958, 1996 U.S. Dist. LEXIS 14717 (E.D. Pa. October 2, 1996) (absent physical impairment "fear of asbestos-related cancer is not a compensable injury"); *Martin v. Vaughn*, CA No. 92-3828, 1995 U.S. Dist. LEXIS 10851 (E.D. Pa. May 30, 1995) (mental anguish from fear of contracting HIV virus is "conjectural" or "hypothetical" injury and does not provide plaintiffs with standing to pursue claims for emotional distress).

In sum, the Second Circuit's decision is contrary to the virtually uniform common law precedent that has refused to recognize claims solely for fear of future, speculative adverse health consequences because of exposure to harmful substances.

II. THE IMPORTANT PUBLIC POLICIES OF PREVENTING UNLIMITED LIABILITY FOR EMPLOYERS AND ENSURING ADEQUATE RECOVERY FOR ALL PHYSICALLY INJURED EMPLOYEES REQUIRE THE REVERSAL OF THE DECISION BELOW

The *Gottshall* decision and the decisions cited above have been based explicitly or implicitly on two important public policy goals: (1) the need to avoid exposing employers to virtually unlimited, unpredictable, and unverifiable claims; and (2) the need to compensate fairly and adequately those individuals that are physically injured and to avoid windfall awards to persons who never suffer any physical injury. Each of these important public policy concerns is present in this

case and argues strongly for the reversal of the Second Circuit's decision below.

A. The Prospect Of Unlimited And Unpredictable Employer Liability Supports The Dismissal Of Mr. Buckley's Speculative Claim

The Court made plain in *Gottshall* that concern regarding the specter of unpredictable and unlimited liability for employers was paramount. 114 S. Ct. at 2408-09, 2411. This concern arises from the highly variable emotional responses of different persons to a particular event, and from the large number of persons that may be emotionally effected by an employers' negligent action. *Id.* at 2409. Thus, this Court concluded that any rule of liability broader that the zone of danger test could cause employers "to face the potential of unpredictable liability to a large number of employees far removed from the scene of the allegedly negligent conduct." *Id.*

In addition, the courts have been sensitive, as they must be, to the significant potential for abuse inherent in emotional distress claims. As one court aptly put it:

> the specter of unlimited liability from an army of plaintiffs parading their tumescent fears into the courtroom supported by a corps of psychiatrists has resulted in proper judicial restraint in this area. Fear is a widespread phenomenon, highly subjective, contagious and capable of being feigned.

Carroll v. Litton Systems, Inc., CA No. B-C-88-253, 1990 U.S. Dist. LEXIS 16833 (W.D. N.C. October 29, 1990), *quoting*, *Arnett v. Dow Chemical Co.*, No. 729586, slip op. at

19 (Cal. Super. Ct., San Francisco County, March 21, 1983). Each of these concerns is applicable in the context of the instant case. If this Court were to uphold the Second Circuit's decision, it would significantly increase the liability of railroad and other employers in any number of contexts.[4]

In the arena of asbestos litigation alone, the effect of the Second Circuit's decision will be dramatic. As this Court certainly is aware, asbestos litigation is a huge and potentially crippling problem for the United States court system, and, indeed, for the United States economy. Tens of thousands of personal injury and wrongful death lawsuits seeking recovery for asbestos-related disease have been filed in state and federal courts over the past twenty-five years.[5] While it is not possible to determine precisely the number of workers and individuals that have been exposed to asbestos, experts have estimated that more than 21 million workers were significantly exposed to asbestos in the 40 years prior to 1980. *See Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1337 (5th Cir. 1985), *citing*, I. Selikoff, *Disability Compensation for Asbestos-Associated Disease in the United*

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[4] As discussed below, *infra* at 19-20, despite respondent's protestations, the increased scope of liability will not be limited to railroad employers. Just as FELA is informed by the common law, *Gottshall*, 114 S. Ct. at 2403, the common law is influenced by this Court's pronouncements of tort law under FELA.

[5] The size of the pending asbestos caseload remains a matter of grave concern. As Judge Weiner, who presides over the federal multi district asbestos personal injury litigation, recently noted, the total number of asbestos cases that have been filed in the multi district proceeding is 58,478, and only approximately 20,000 of these have been resolved to date. *See In re Asbestos Prods. Liab. Litig.*,1996 WL 239863, at *5 (E.D. Pa. May 2, 1996).

States, Environmental Sciences Laboratory, Mt. Sinai School of Medicine of the City University of New York (1981).

If the Second Circuit's decision is affirmed, there would be, for all intents and purposes, no limit to the class of plaintiffs that would be entitled to sue for negligent infliction of emotional distress. Literally any worker that had any regular contact with asbestos fibers in the work place, and there are certainly millions of such individuals, would be entitled to sue for any increased worry and concern they might have as a result of that exposure. An employer's liability would be nearly limitless and entirely unpredictable. As the Third Circuit concluded,

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

Moreover, this decision will not be limited to asbestos claims or to the employment context. Beyond asbestos, employers could potentially be liable for any negligently-created working condition that increased an employee's anxiety about his future health. Employees who worked with and inhaled toxic gases or chemicals, or even employees that inhaled secondhand smoke in the work place, could assert claims for negligent infliction of emotional distress based solely on their increased worry about developing cancer or other diseases. A worker that worked around and absorbed the emanations from high-powered electric lines could potentially sue based on the presence of electromagnetic fields that increased his anxiety about getting brain cancer. Similarly, individuals that inhaled or ingested allegedly toxic substances from negligently contaminated land, water supplies, or foodstuffs could sue simply for the increased anxiety this caused them without having to establish any physical effect whatsoever from the ingestion. This is precisely the sort of unlimited, unpredictable, and unprincipled liability that this Court denounced in *Gottshall*.

B. Allowing Recovery Solely For Anxiety Will Result In Windfalls To Uninjured Plaintiffs and Will Divert Existing Judicial And Financial Resources From Physically-Impaired Individuals

At bottom, damage awards for negligent tort actions are designed fairly to compensate the claimant for actual damages incurred. If claims for fear of cancer are allowed to proceed, significant inequities will inevitably result. Those who suffer no physical injury may receive substantial windfall awards, while others that have considerable physical impairment may ultimately be under compensated.

Damages awarded for fear of cancer are necessarily wholly speculative. To allow such awards would contravene longstanding principles against allowing the award of speculative damages, and any award will suffer the same deficiencies cited to deny speculative damages. Specifically, in the instant context, those individuals that receive a damage award for their anxiety and never develop any physical impairment, and the overwhelming majority of plaintiffs will fall into this category, will have received a windfall -- that is, compensation for their anticipatory worry about a potential result that did not, in fact, occur. *See Schweitzer,* 758 F.2d at 942 (award of damages for fear of cancer is wholly speculative and necessarily would lead to unfair results); *Simmons*, 674 A.2d at 238 (same). Moreover, because of the speculative nature of these damages, damage awards for fear would be subject to few, if any, objective limitations or standards. These awards are likely to vary widely, resulting in huge awards to some and little to others.[7]

At the same time, the pursuit of these anticipatory claims for mental distress, if allowed, will divert limited judicial and financial resources from those who suffer from physical impairments due to asbestos. As Judge Weiner poignantly noted in dismissing a class of plaintiffs that alleged no physical impairment:

> Although this Court retains a vigilant concern for all parties to the litigation, the Court has prioritized from the onset the victims of asbestos-related

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[7] The lack of limiting standards and the prospect, therefore, of a substantial jury award for fear and anxiety will likely serve only to encourage the filing of more claims for negligent exposure to asbestos and other harmful substances.

> disease, and in particular, those who suffer with malignant conditions as well as their families. The Court's focus is to administer these cases as it has all the others by seeing that they are resolved in an equitable and expeditious manner either by settlement or by trial while making certain there will be sufficient resources available to compensate those who are deserving.

In re Asbestos Prods. Liab. Litig., 1996 WL 239863, at *18.

As this Court is undoubtedly aware, neither the nation's judicial resources nor the resources of asbestos defendants are infinite. The bankruptcy filings of numerous asbestos manufacturers attest to the unavoidable fact that there is a limited amount of money available to compensate those individuals injured by asbestos, and that pool of funds may be exhausted at some point. For this reason, experts have counseled that claims should be addressed in the order of their severity. *See, e.g.*, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv.J.L. & Pub. Pol'y 541 (1992); *In re Asbestos Prods. Liab. Litig.*, 1996 WL 239863 at *5 (dismissing claims of asymptomatic plaintiffs because they "waste this Court's time. Other victims suffer while the Court is clogged with such filings.").[8]

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[8] The very real possibility that future claimants may have no practical recourse against bankrupt asbestos defendants was recognized by the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist, which reported that:

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the

(continued...)

Certainly, the interests of individuals such as Mr. Buckley, who have no physical impairment and only generalized anxiety about their future health, should not be placed ahead of those that have suffered or will suffer physical injury because of their asbestos exposure.

Finally, allowing asbestos plaintiffs, such as Mr. Buckley, to recover for their "fear of cancer" alone, may ultimately under compensate them if they actually do develop an asbestos-related impairment. FELA has traditionally been a single recovery statute, meaning that a plaintiff may sue only one time for injuries arising from a particular wrongful act of the employer. *See Mellon v. Goodyear*, 277 U.S. 335, 344 (1928); *Flynn v. New York. N. H. & H. R. Co.*, 283 U.S. 53, 56 (1931). While some courts have modified this rule in the context of latent diseases, this issue has not been finally resolved in the context of a FELA claim for negligent infliction of emotional distress.[9] The Second Circuit here explicitly ruled that Mr. Buckley can recover only for his current emotional harm and not for the risk of contracting an

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[8](...continued)
victim's recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (March 1991), p. 3. These deficiencies in the current system will only be exacerbated if claimants alleging only fear of asbestos injury are permitted to pursue claims.

[9] Significantly, Mr. Buckley provides no support for his bald assertion that a "FELA claim for the negligent infliction of emotional distress is separate and distinct from a FELA manifest physical injury claim." Respondent's Brief in Opposition to the Petitioner for Writ of Certiorari at 13 n.5.

asbestos-related disease at some future date. (A-18, n.1) If Mr. Buckley ultimately develops a physical impairment, it is not clear that he will be able to pursue a second claim against Metro-North for his physical injury. Thus, if his claim is allowed to go forward now, Mr. Buckley could potentially end up considerably *under compensated* for injuries caused by his asbestos exposure.

C. Mr. Buckley's Situation Is Not Unique And Allowing Him To Recover For Fear Will Set A Far-Reaching Precedent

Mr. Buckley essentially concedes that allowing him to pursue a claim for fear of future disease will expand the current tort law, and devotes much of his argument to assuring this Court that such an expansion will effect only a narrow group of potential claimants. Specifically, respondent claims that this Court's decision will apply only to railroad employees covered by FELA, *see* Respondent's Brief In Opposition to Petition for Certiorari at 7, and will apply only to those employees that have "massive" or "significant" exposure to asbestos. *Id.* at 8. Neither of these limiting arguments is persuasive.

The first limiting principle respondent raises -- that this decision will have no application outside the FELA context -- can be easily disposed of. As this Court noted in *Gottshall*, FELA decisions are informed by the common law, especially in the context of the claim asserted here. 114 S. Ct. at 2404 ("Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a

significant role in our decision.")[10]; *see Atchison, Topeka & Santa Fe Railway*, 480 U.S. 557, 569 (1987) ("FELA jurisprudence gleans guidance from common-law developments"). Thus, this Court's FELA decisions are explicitly based on the Court's interpretation of the current status of the tort law landscape. It therefore makes little sense to argue that lower courts will not be influenced by this Court's pronouncements as to its views of the settled principles and/or emerging trends in modern tort law.

Respondent's "significant exposure" test is also not an effective limit. At the outset, it is precisely the same sort of "highly subjective," "fact-specific test" as the genuineness inquiry that this Court declared unworkable in *Gottshall*. 114 S. Ct. at 2409. How much exposure is "significant" would be bound to vary with every court and with every harmful substance, leading to the imposition of haphazard and inconsistent liability on defendants.

Respondent appears to recognize this difficulty and attempts to link the "significant exposure" test to a known standard. How much exposure does Respondent think is significant? Evidently, any amount that exceeds the current Occupational Safety and Health Administration (OSHA) guidelines for the presence of asbestos in the workplace. The breadth of the liability advocated by Respondent is thus truly

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[10] Indeed, this Court specifically scolded the Third Circuit for ignoring the common law. 114 S. Ct. at 2408 ("By treating the common-law tests as mere arbitrary restrictions to be disregarded if they stand in the way of recovery on `meritorious' FELA claims, the Third Circuit put the cart before the horse: the common law must inform the availability of a right to recover under FELA for negligently inflicted emotional distress, so the `merit' of a FELA claim of this type cannot be ascertained without reference to the common law.").

staggering. Any time that an employer negligently violated an applicable OSHA guideline, it could be liable for any resulting anxiety in its work force. Similarly, any defendant that negligently violated any environmental or other agency guideline at any of its sites could be liable to surrounding residents or others who were exposed to the site.[11]

Finally, there is the suggestion throughout both Respondent's Brief in Opposition to the Petition for Certiorari and the Second Circuit's decision that Metro-North must be punished for its allegedly egregious conduct here. It is important to remember, however, that no ultimate findings of fact exist on these issues because the District Court directed a verdict in favor of Metro-North at the close of Mr. Buckley's case. *Buckley v. Metro-North Commuter R.R.*, No. 89 Civ. 7170-A (WK), 1995 WL 110380 (S.D.N.Y. March 15, 1995). Further, Mr. Buckley's claim is for *negligent* infliction of emotional distress, and does not assert any intentional wrongdoing. Thus, the only issue before the Second Circuit and now this Court is whether, based on simple negligence, a defendant can be required to compensate its employees for emotional distress if they are exposed to asbestos at some indeterminate level above normal background amounts. It is broadly recognized that punishment is not an appropriate goal of negligence law. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 504 (1982).

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[11] The number of persons who believe that they have been "significantly" exposed to harmful substances is demonstrated vividly by the number and variety of cases that already have been brought attempting to recover for emotional distress. *See supra* at p. 11-12.

In sum, the Second Circuit, unlike virtually every other court to consider this issue, has ruled that individuals that have ingested, inhaled, or otherwise absorbed a potentially harmful substance because of another's simple negligence may sue for any increased anxiety that this causes them. The breadth of this ruling, if affirmed by this Court, will have a substantial detrimental effect on the judiciary, business defendants, and physically injured claimants.

III. THE DECISION BELOW WOULD MAKE EMPLOYERS' LIABILITY BROADER AND MORE UNPREDICTABLE, THUS MAKING IT MORE DIFFICULT TO INSURE

The decision below would expand employers' liability for emotional distress far beyond the boundaries of the zone of danger exception. The increased breadth and unpredictable nature of this liability will increase the cost and restrict the availability of liability insurance.

When considering claims for emotional distress, it is important to keep in mind that workplace mental distress is far more difficult for an employer to predict and prevent than physical injury. Physical injuries, which have a clear physical cause and effect, do not depend primarily on the individual characteristics of the plaintiff.[12] Emotional injuries, on the other hand, depend entirely on such characteristics. *See* Marc

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[12] While the emotional response of a plaintiff within the zone of danger is also dependent on his or her individual propensities, the zone of danger exception itself is premised on the occurrence of a particularly horrible accident or other singular physical event. For this reason, it is a much more limited area of liability than that created by the decision below.

A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages In the Absence of Physical Injury*, 1990 Ann. Surv. Am. Law 671, 672. "Where a workman loses a finger because of an errant piece of machinery, the ascertainable injury and the work-related cause are direct and simple. However, emotional distress may have multiple causes, some work-related, others not so related." *Archer v. Indus. Comm'n*, 619 P.2d 27 (Ariz. Ct. App. 1980). Clearly, a worker's "personal subjective vulnerability" determines his or her reaction to job conditions, including job stress or exposure to toxic agents. Sara J. Sersland, *Mental Disability Caused By Mental Stress Cases*, 33 Drake L. Rev. 751, 757 (1983-84). Moreover, while asbestos-related diseases follow an etiology that allows their rate to be predicted with some statistical certainty, and historical claims rates can be used to predict the rate of industrial accidents, emotional distress claims have no such characteristic.

It is simply not possible to estimate with any degree of certainty the number of persons that may have an adverse emotional response to exposure to asbestos or to any other unsafe working condition. The unpredictability of emotional distress, and therefore of liability for emotional distress under a negligence standard, will have an important economic consequence: it will reduce the availability and increase the cost of liability or workers' compensation insurance. Insurance requires that risk be statistically predictable over the long term. *See* Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 136-37 (1988); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio St. L.J. 399, 404-09 (1987). Insurers do not have the means to make the predictions about the incidence and severity of emotional distress claims that are necessary to

price an insurance product efficiently. Employers will therefore find liability insurance more difficult to find and more costly to purchase.[13] These increased costs will be passed on, in whole or in part, to workers, in the form of lower wages, and/or consumers, in the form of higher prices.

IV. THE APPLICATION OF THE STATUTE OF LIMITATIONS TO CLAIMS FOR FEAR OF FUTURE ILLNESS IS UNWORKABLE

Finally, allowing Mr. Buckley's speculative claim to proceed would not only represent bad policy, it will also lead to practical problems in the prosecution of such claims. Specifically, the relevant statute of limitations issues would be exceedingly difficult to adjudicate.

The application of a statute of limitations depends on a determination as to when the claim being asserted arose. Virtually every court that has considered asbestos claims in this context has determined that no claim arises "until an objectively verifiable functional impairment develops." *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1570 (D.

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[13] As stated by the dissenting judge in *Vallery v. Southern Baptist Hospital*, 630 So.2d 861, 870 (La. App. 1993):

> Where insurance companies cannot quantify a certain risk, the cost of insurance can be out of all proportion to the risk. [Allowing individual to recover for fear of AIDS without an physical injury] would add another costly layer of inordinate expense to the treatment of AIDS without doing anything to advance the treatment of AIDS. From a public policy perspective, this would represent a very poor allocation of health care dollars at a time when money for AIDS is insufficient in particular, and the cost of health care in general is in crisis.

Hawaii 1990); *accord Simmons v. Pacor, Inc. et. al.*, 674 A.2d 232 (Pa. 1996); *Locke v. Johns-Manville Corp.*, 275 S.E.2d 900 (Va. 1981). This is consistent with the precedent of this Court. *See Urie v. Thompson*, 337 U.S. 163, 170 (1949) (worker exposed to silica dust sustains injury and cause of action accrues only as of time that adverse effects first manifest themselves). Thus, the development of a physical injury is the triggering event, and the applicable statute of limitations begins to run from that time.[14]

With a claim solely for emotional distress, entirely unconnected to any physical event, injury, or even symptom, there is no objectively verifiable triggering event to begin the running of the statute of limitations. A plaintiff could arbitrarily set the date on which his emotional distress developed. This date could be manipulated to achieve the largest recovery from an employer and/or its insurance companies. (For example, the date could be set just prior to or after a sale of the employing company, whichever was perceived to be most advantageous, or at a time when the employer's insurance coverage was greatest.) Because of the long incubation period of asbestos-related disease, there could be a twenty or thirty-year period over which a plaintiff could at any time decide that he could no longer cope with the fear of cancer and elect to pursue a claim for negligent infliction of emotional distress. Obviously, this significantly undermines the policy underlying statutes of limitations; i.e., that at some point in time the law should no longer recognize a claim.

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[14] Similarly, under the narrow "zone of danger" exception, the triggering event for the statute of limitations is a known physical accident of incident.

On the other hand, employers would likely argue that the statute of limitations for an emotional distress claim should begin to run at the time that the plaintiff "knew" all the facts about his exposure and the health risks of asbestos. Again, this is an unknown, virtually unverifiable date. Employers would gather evidence seeking to establish this event on the most convenient date for the employer. Insurance companies that may have provided coverage to the employer over different time periods would certainly weigh in to argue for a particular, advantageous start of the statute of limitations period.

In short, simply establishing the date on which the "claim" arose would be a highly fact-specific threshold inquiry that could require its own mini-trial to resolve. *See In re Hawaii*, 734 F. Supp. at 1570 (refusing to recognize a claim for fear of cancer in part because "[a] regime of recovery for emotional distress not anchored to an underlying compensable harm presents boundless headaches in adjudicating statute of limitations problems."). Such serious practical obstacles to adjudicating claims properly argue strongly against expanding tort liability in this manner.

In sum, there are considerable "costs" -- whether in the form of increased crowding of the courts, the potential for the exhaustion of available resources to compensate asbestos plaintiffs, or the direct costs associated with buying insurance coverage and paying claims -- that will result from the expansion of FELA liability in the manner directed by the Second Circuit. These costs will be borne by society as a whole to benefit a class of plaintiffs, the majority of whom *will never contract any form of asbestos-related disease.* This

is too great a price to pay and one which the law does not support.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Second Circuit.

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No. 96-320

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,
v.
MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* THE CHEMICAL MANUFACTURERS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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METRO-NORTH COMMUTER RAILROAD COMPANY,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* THE CHEMICAL MANUFACTURERS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

The Chemical Manufacturers Association ("CMA") is a non-profit trade association whose members produce, market, and use industrial chemicals. The chemical industry employs over one million workers in this country, and on a value-added basis, it accounts for over ten percent of U.S. manufacturing. The Chamber of Commerce of the United States ("Chamber") is the largest federation of business, trade, and professional organizations in the United States. It represents more than 215,000

[1] Petitioner and respondent have consented to the filing of this brief; letters to that effect have been lodged with the Clerk.

companies, as well as several thousand trade and professional organizations, and state and local chambers of commerce.

The Court of Appeals in this case and a small number of other courts have held that persons who have been exposed to a hazardous substance but have not developed, and probably will never develop, a resulting illness may nevertheless recover the cost of special future medical testing to detect delayed-onset diseases that might conceivably result from the exposure. These courts in effect have invented an entirely new cause of action—the tort of "medical monitoring"—that lacks any historical pedigree and is today recognized in only a handful of jurisdictions.

Industrial companies, including members of the CMA and many members of the Chamber, have long "monitored" the health of their employees who work with hazardous substances, but that activity is quite different from the type of monitoring contemplated by the medical monitoring tort. The point of monitoring in the industrial setting is to ascertain whether workers with ongoing exposure to potentially hazardous substances *currently* suffer any adverse effects of that exposure, and, if so, to reduce their exposure. The medical monitoring tort, by contrast, compensates persons who allegedly face a risk of becoming ill in the distant future because of exposure to a hazardous substance in the past. Monitoring in industry is based on sound principles of medicine and industrial hygiene. The medical monitoring tort rests on assumptions about the benefits of medical testing for asymptomatic persons that have generally been rejected by the medical profession itself.

This Court's recognition of a claim for medical monitoring under the Federal Employers Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, could inundate the judicial system with claims by railroad workers who are not ill as a result of exposure to chemicals and are unlikely ever to become so. Such a ruling would also doubtless influence the

development of common-law tort doctrine in this area.[2] The CMA and the Chamber submit that this Court should reject any interpretation of the FELA that allows persons without manifest injury in the traditional sense to recover the costs of future medical testing.

SUMMARY OF ARGUMENT

There is considerable intuitive appeal to the idea that people who face a risk of future illness would benefit by receiving periodic testing to detect the possible onset of disease. In recent years, however, the medical profession has subjected that intuition to critical scrutiny and has found it for the most part to be unsound. Medical science now recognizes that persons without manifest symptoms of illness ordinarily benefit from only a fairly small number of well-established tests that are recommended for almost everyone. The sort of special testing of asymptomatic persons envisioned by the medical monitoring tort has been found to be generally ineffective. If medical science does not see substantial value in special testing of asymptomatic persons, there is certainly no basis for courts to elevate the claimed "need" of exposed persons for such testing to the status of a legally protected interest.

The medical monitoring tort, if widely accepted, would have staggering implications for the administration of the civil justice system. This new tort opens the courthouse doors to literally millions of would-be claimants who have no demonstrable illness, but who can allege some type of exposure to some substance that may create a risk of future illness. And once inside the courthouse, these

---

[2] This Court's interpretations of tort principles, although undertaken in connection with issues of federal law, are often followed by courts confronting similar issues under state law. *See, e.g., Casa Clara Condominium Ass'n* v. *Charley Toppino & Sons*, 620 So. 2d 1244, 1246-47 (Fla. 1993) (following *East River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858 (1986)); *Dickerson* v. *International UAW Union*, 648 N.E.2d 40, 50 (Ohio Ct. App. 1994) (following *Consolidated Rail Corp.* v. *Gottshall*, 114 S. Ct. 2396, 2411 (1994)).

claims are not easily screened out, because the medical monitoring tort as courts have so far defined it sets the threshold of a triable claim extremely low and tolerates, indeed invites, highly speculative proof.

ARGUMENT

I. THE MEDICAL MONITORING TORT IS A RADICAL DEPARTURE FROM THE COMMON LAW.

A. The Tort Rests on a Novel Notion of "Injury."

The traditional rule under the common law is that to maintain a cause of action for negligence, a plaintiff must allege that he has sustained either a manifest personal injury (physical harm or, in some circumstances, emotional harm) or damage to property. *See* Patrick S. Atiyah, *Negligence and Economic Loss*, 83 L.Q. REV. 248, 248 (1967) (noting the "general principle denying liability for purely economic loss in the law of negligence"); *see also In re Paoli R.R. Yard PCB Litig.* ("*Paoli I*"), 916 F.2d 829, 850 (3d Cir. 1990) ("traditionally, injury needed to be manifest before it could be compensable"); Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 122 (1995). This was the common-law rule in 1908 when the FELA was enacted. *See* 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 493 (1906) ("it appears that injury is always a prerequisite condition of liability and without injury no right of action can exist").

A corollary of this rule is that a plaintiff may recover the cost of future medical procedures only if he has suffered a manifest personal injury and proves that those future expenses are reasonably certain to be incurred as a result of the injury. This is the traditional rule, *see* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 90 (1935), and it is the prevailing rule today, *see* JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 5.18, at 245-47 (2d ed. 1991) (future medical expenses must be "reasonably certain to become necessary" and "[t]here must be evidence of a continuing or permanent disability and the necessity of future medical treatment of the disability").

In the last fifteen years, however, a small number of courts have abandoned the requirement of manifest injury in "toxic tort" cases. These courts have held that plaintiffs who have been exposed to a hazardous substance but have not experienced—and probably will never experience—a resulting illness are nevertheless entitled to recover the cost of future "medical monitoring" (sometimes denominated "medical surveillance") to facilitate early detection of delayed-onset diseases for which they allegedly have been placed at increased risk because of the exposure. *See, e.g., Paoli I*, 916 F.2d at 852; *Ayers* v. *Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987); *Potter* v. *Firestone Tire & Rubber Co.*, 25 Cal. Rptr. 2d 550, 579-80 (1993); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 975-82 (Utah 1993). Typically the diseases of concern are various forms of cancer. *See Ayers*, 525 A.2d at 311. Because cancers usually occur later in life, the risk of cancer is thought to require lifetime, or at least very long-term, medical monitoring. *See id.* at 313 n.13 (plaintiffs awarded damages to cover lifetime medical monitoring).

Some courts, including the Court of Appeals in the present case, seemingly base the plaintiff's entitlement to medical monitoring on a theoretical construction of the notion of physical "injury." These courts hold that exposure to a hazardous substance, in itself, constitutes a physical injury, and so under traditional tort principles one who has been exposed because of the defendant's negligence may recover the full range of damages flowing from the injury, including the cost of future medical monitoring procedures allegedly necessitated by the exposure. *See Buckley* v. *Metro-North Commuter R.R.*, 79 F.3d 1337, 1343-45, 1347 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996); *Askey* v. *Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 246-47 (App. Div. 1984).

More commonly, though, courts that have allowed recovery for medical monitoring have not attempted to shoehorn the claim into the conventional definition of "injury." Instead, they have dispensed with the requirement altogether to create what they acknowledge is a "non-traditional," independent tort. *E.g., Paoli I*, 916 F.2d at 849; *Cook* v. *Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1476 (D. Colo. 1991). These courts hold that the plaintiff's need to incur the cost of future medical monitoring procedures as a result of an alleged chemical exposure is itself an actionable injury. *E.g., Paoli I*, 916 F.2d at 851-52; *Cook*, 755 F. Supp. at 1477; *Meyerhoff* v. *Turner Constr. Co.*, 534 N.W.2d 204, 206 (Mich. Ct. App. 1995), *appeal denied*, 550 N.W.2d 538 (Mich. 1996); *Hansen*, 858 P.2d at 977. The Second Circuit in this case approvingly cited decisions that have recognized claims for medical monitoring on this basis. *See* 79 F.3d at 1347.

Although the courts have offered slightly varying statements of the medical monitoring tort, one widely cited formulation holds that a plaintiff must prove the following elements:

> 1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
>
> 2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
>
> 3. That increased risk makes periodic diagnostic medical examinations reasonably necessary.
>
> 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Paoli I, 916 F.2d at 852. The *Paoli I* "definition is generally in accord with how other courts have characterized medical monitoring claims." *Building & Constr. Dep't* v. *Rockwell Int'l Corp.*, 7 F.3d 1487, 1493 (10th

Cir. 1993). The medical monitoring tort compensates exposed persons only for "special" medical testing made necessary by the exposure, that is, testing beyond what would be necessary or appropriate even without the exposure. *See In re Paoli R.R. Yard PCB Litig.* (*"Paoli II"*), 35 F.3d 717, 788 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995); *Hansen*, 858 P.2d at 980. To make out a claim for such special testing, however, a plaintiff need not prove that he will in fact contract a disease caused by the exposure, nor even that his developing such a disease in the future is more probable than not. *Ayers*, 525 A.2d at 309. A "significant" risk of future disease, as courts have defined it, can be very small. *See infra* at 23.

Even as they acknowledge the novelty of the medical monitoring tort, courts that have recognized the claim have sought to downplay the extent of its departure from traditional tort principles. Typical is the reasoning of one court:

> A plaintiff who is involved in an automobile accident and suffers no observable physical injury but nevertheless undergoes medically necessary diagnostic tests to determine whether internal injuries exist is no doubt entitled to recover the costs of the examination. . . . The outcome should be the same when the operative incident is toxic exposure rather than collision.

Miranda v. *Shell Oil Co.*, 7 Cal. Rptr. 2d 623, 626 (Cal. Ct. App. 1992). But the analogy drawn by this passage is flawed in two respects. First, the plaintiff who is involved in an automobile collision does in fact sustain physical "injury" in a traditional sense—a traumatic force to the body—even if the injury is not "observable" after the fact or is too insignificant to warrant compensation. *See, e.g., Homans* v. *Boston Elevated Ry. Co.*, 62 N.E. 737 (Mass. 1902). The introduction of unwanted chemicals into the human body is not a physical injury in any familiar sense. *See, e.g., Schweitzer* v. *Consolidated Rail*

Corp., 758 F.2d 936, 942 (3d Cir. 1985). If chemical exposure is an injury, then almost every person in industrialized society is injured on a daily basis. *See infra* at 21-22. A second flaw in the analogy is that the automobile accident victim recovers only for testing expenses *actually incurred* to ascertain the extent of then-existing damage, if any, from the traumatic force. *See, e.g.*, *Newsom* v. *Markus*, 588 S.W.2d 883, 887-88 (Tenn. Ct. App. 1979). The medical monitoring tort, by contrast, compensates plaintiffs for the costs of long-term *future* medical testing to diagnose injuries that do not yet exist and probably will never develop.

B. The Medical Monitoring Tort Has Been Recognized in Only a Small Minority of Jurisdictions.

In FELA cases, this Court "look[s] to the common law when considering the right to recover asserted" by the plaintiff. *Consolidated Rail Corp.* v. *Gottshall*, 114 S. Ct. 2396, 2411 (1994). To the extent that the point of reference is the common law in 1908, when the FELA was enacted, the medical monitoring tort finds no support. In 1908, courts in this country required some manifest physical or emotional injury as a prerequisite of a negligence action, *see* THOMAS ATKINS STREET, *supra*, at 493, as indeed they did for many years thereafter. A claim for "medical monitoring" was not mentioned in a reported decision until the late 1970s, and no appellate court appears to have recognized the medical monitoring tort until the 1984 decision of the New York Supreme Court Appellate Division in *Askey*, 477 N.Y.S.2d at 242. *See* George W.C. McCarter, *Medical Sue-veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 231-42 (1993) (tracing the early history of the tort); *cf. Gottshall*, 114 S. Ct. at 2411 ("relative bystander" test of negligent infliction of emotional distress "was not developed until 60 years after FELA's enactment, and therefore lacks historical support").

Today the medical monitoring tort has been recognized in only a small minority of jurisdictions. In only three states—New Jersey, California, and Utah—has the highest state court recognized it. *See Ayers*, 525 A.2d at 297-313; *Potter*, 25 Cal. Rptr. 2d 550, 579-80; *Hansen*, 858 P.2d at 975-82.[3] And the Supreme Court of New Jersey, after broadly embracing the tort in *Ayers*, has since sharply limited its availability. That court now holds that the claim "is not easily invoked," and may be pursued only by persons who have experienced "direct[]" exposure to a hazardous substance or have suffered a physical injury as a result of the exposure. *Theer* v. *Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993).

In three other states—Arizona, Michigan, and New York—medical monitoring claims have been recognized by intermediate appellate courts. *See Burns* v. *Jaquays Mining Corp.*, 752 P.2d 28, 33-34 (Ariz. Ct. App. 1987); *Meyerhoff*, 534 N.W.2d at 206; *Askey*, 477 N.Y.S.2d at 246-47 (dictum). Elsewhere the courts that have "recognized" this new tort have been federal courts sitting in diversity, which have ventured predictions of state law in the absence of any controlling authority. *See Cook*, 755 F. Supp. at 1476-77 (Colorado law); *Woodman* v. *United States*, 1995 U.S. Dist. LEXIS 2787, at *121-22 (M.D. Fla. Jan. 24, 1995) (Florida law); *Bocoock* v. *Ashland Oil, Inc.*, 819 F. Supp. 530 (S.D. W. Va. 1993)

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[3] The Supreme Court of Pennsylvania has held that medical monitoring expenses may be recovered by persons who have suffered pleural thickening as a result of asbestos exposure. *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 239-40 (Pa. 1996). Although *Simmons* held that pleural thickening is not a sufficient "injury" to support recovery for mental anguish because the condition is not accompanied by "disabling consequences or physical impairment," *id.* at 236, 238, pleural thickening is a clinically identifiable physical consequence of asbestos exposure. *See Fried* v. *Sungard Recovery Servs.*, 936 F. Supp. 310, 311 (E.D. Pa. 1996) (plaintiffs with no physical manifestations of exposure may not recover for medical monitoring because *Simmons* requires proof of "demonstrable physical consequences" caused by exposure).

(Kentucky law); *Gibbs* v. *E.I. DuPont de Nemours & Co.*, 876 F. Supp. 475, 477-79 (W.D.N.Y. 1995) (New York law); *Day* v. *NLO, Inc.*, 851 F. Supp. 869, 879-82 (S.D. Ohio 1994) (Ohio law); *Paoli I*, 916 F.2d at 849-52 (Pennsylvania law).[4] These forecasts of state law are at best an uncertain gauge of the common law's current attitude on the matter, because federal courts' predictions of state law are "not binding on state courts and may be discredited at any time." *Moore* v. *Sims*, 442 U.S. 415, 428 (1979); *cf. Paoli II*, 35 F.3d at 786 (noting that intervening Pennsylvania decisions had "cast[] some doubt" on the prediction ventured in *Paoli I*).

There is by no means an obvious trend toward acceptance of the medical monitoring tort. A number of courts have considered and explicitly rejected the claim. These

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[4] Certain other courts have used the term "medical monitoring" in connection with requests for future medical expenses by plaintiffs who have allegedly sustained a physical injury as a result of chemical exposure. *See, e.g., Hagerty* v. *L&L Marine Servs., Inc.*, 788 F.2d 315, 319 (5th Cir. 1986) (plaintiff had "[d]izziness, leg cramps, and a persistent stinging sensation in feet and fingers"); *Burton* v. *R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522-23 (D. Kan. 1995) (plaintiff had peripheral vascular disease). In upholding such requests, these courts have applied traditional damages principles, *see id.* at 1523, and have not endorsed a free-standing medical monitoring tort.

Friends for All Children, Inc. v. *Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984), is sometimes cited, erroneously, as a progenitor of the medical monitoring tort. *See, e.g., Paoli I*, 916 F.2d at 851; *Ayers*, 525 A.2d at 309-10. In *Friends for All Children* the plaintiffs had been on board an aircraft when it experienced an explosive decompression and crashed, and they all claimed to have a *then-existing* neurological injury as a result of the incident. 746 F.2d at 819. The defendant conceded liability for all compensatory damages. *Id.* at 822. The trial court issued, and the D.C. Circuit affirmed, an injunction *pendente lite* requiring the defendant to fund *one-time* diagnostic examinations of certain plaintiffs to determine whether they were *at that time* in fact suffering from the neurological injuries they claimed. *Id.* at 822, 828. In essence, the plaintiffs were in the position of the automobile-accident victim in the illustration discussed *supra* at 7-8.

courts hold, following the traditional common law rule, that persons who have been exposed to a hazardous substance may recover for future medical testing only if the exposure has caused a physical injury. *See Mergenthaler* v. *Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Hayes* v. *AC&S, Inc.*, No. 95 CH 1835, slip op. at 12-14 (Cir. Ct. Cook Cty. Ill. Oct. 30, 1996); *Thomas* v. *FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994) (Missouri law); *Carroll* v. *Litton Sys. Inc.*, 1990 U.S. Dist. LEXIS 16833, at *148-53 (W.D.N.C. Oct. 29, 1990) (magistrate's report and recommendation) (North Carolina law); *Purjet* v. *Hess Oil Virgin Islands Corp.*, 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1986) (Virgin Islands law); *Ball* v. *Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (Virginia and West Virginia law).

II. THE MEDICAL COMMUNITY HAS REACHED A CONSENSUS THAT DIAGNOSTIC TESTING OF ASYMPTOMATIC PERSONS IS APPROPRIATE ONLY IN WELL-DEFINED SITUATIONS.

Whether a certain type of alleged detriment should be recognized as a legally cognizable "injury" is not an issue of fact to be determined case by case, but a question of law and policy for the courts. *See Gottshall*, 114 S. Ct. at 2403. The answer depends in large part on whether there is an expert consensus that the particular interest asserted is important enough to warrant society's protection. Recognition of infliction of emotional distress as an independently actionable tort, for instance, was prompted by the conclusion of medical science "that not only fright and shock, but also anxiety, grief, rage and shame, are in themselves 'physical' injuries, producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye." William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 876 (1939). On the other hand, in the absence of widespread agreement that they should be protected, "[t]here are some interests to which the law simply has not extended protection from

injury." 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 18.3, at 671 (2d ed. 1986).

In holding that the need to incur the cost of special future medical testing is itself an "injury" deserving of legal protection, courts that have recognized the medical monitoring tort have simply assumed that there is a strong social interest in seeing that exposed persons who display no signs of illness receive special medical testing to detect the possible presence of latent disease. The Supreme Court of New Jersey, for example, has declared that "[t]he value of early diagnosis and treatment for cancer patients is well-documented," citing nothing but the opinion of a member of that court in another case. *Ayers*, 525 A.2d at 311 (citing *Evers* v. *Dollinger*, 471 A.2d 405, 418-19 (N.J. 1984) (Handler, J., concurring)); *see also Askey*, 477 N.Y.S.2d at 247 ("[t]here is no doubt that [medical monitoring] would permit the early detection and treatment of maladies"); *Miranda*, 7 Cal. Rptr. 2d at 627 ("[i]t is common knowledge [that] early diagnosis of many serious conditions promotes enhanced cure and survival rates")

Intuition, it is true, has long told us that going to the doctor is a good thing, and that healthy people should routinely undergo medical testing and examination to facilitate the early detection of a wide variety of latent diseases, especially cancers. For many years that intuition was shared by medical practitioners and lay people alike. *See* Stanley Joel Reiser, *The Emergence of the Concept of Screening for Disease*, 56 MILBANK MEMORIAL FUND *Q./* HEALTH & SOC'Y 403, 406-17 (1978). But in recent years physicians have come to recognize that diagnostic testing, like any other medical intervention, is not good for the patient unless the likely benefits outweigh the risks. Medical science has developed a sophisticated and well-accepted methodology for assessing the medical risks and benefits of diagnostic tests, and the application of that methodology has made clear that our intuition about the desirability of diagnostic testing is generally incorrect.

The medical community now recognizes that, while diagnostic testing makes sense for patients *with symptoms* of disease, such testing is generally not beneficial when applied to persons who do *not* have symptoms of illness. Thus, at the same time that courts have deemed the benefits of extensive medical monitoring to be too obvious to require detailed explanation, medical science after extensive study has come to precisely the opposite conclusion—apart from a small number of well-established testing procedures that are recommended for almost everyone of a given age, the testing of asymptomatic persons to detect latent disease rarely improves outcomes, can be harmful, and is usually not justified. This is true even for those who face a substantially increased risk of disease, such as workers at risk of cancer because of occupational exposure to carcinogens. *See infra* at 17. No court that has recognized the medical monitoring tort has acknowledged, let alone examined, the teachings of modern medical science on this issue.

The consensus view of the medical community on the subject is reflected in the work of the U.S. Preventive Services Task Force ("Task Force"). The United States Public Health Service commissioned the Task Force in 1984, and reconstituted it in 1990, to "develop[] recommendations for clinicians on the appropriate use of preventive interventions, based on a systematic review of evidence of clinical effectiveness." U.S. PREVENTIVE SERVICES TASK FORCE, GUIDE TO CLINICAL PREVENTIVE SERVICES xxviii (2d ed. 1996) ("TASK FORCE GUIDE"). The Task Force has focused in particular on the effectiveness of what physicians refer to as "screening tests"—various tests and procedures that can be administered to asymptomatic persons in an effort to identify those with disease requiring special intervention. Its recommendations have been formulated in cooperation with a number of other health-care organizations, including the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Physicians, the Centers for Disease Control, and the National Institutes

of Health. *Id.* at liii. More than 700 experts reviewed the Task Force's recommendations before their publication. *Id.* at liv.

The Task Force's methodological point of departure is this:

> [A] screening test must satisfy two major requirements to be considered effective:
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> - The test must be able to detect the target condition earlier than without screening and with sufficient accuracy to avoid producing large numbers of false-positive and false-negative results . . . .
> - Screening for and treating persons with early disease should improve the likelihood of favorable health outcomes . . . compared to treating patients when they present with signs or symptoms of disease.

Id. at xlii.

No screening test is accurate in all cases. *See id.* at xliii-xliv. Inaccuracies generally result not from faulty administration of the test by medical personnel but from the inherent difficulty of defining on a generalized basis what constitutes an "abnormal" test result. Philip Cole & Alan S. Morrison, *Basic Issues in Population Screening for Cancer*, 64 J. NAT'L CANCER INST. 1263, 1266 (1980) (noting crucial role of the "criterion of positivity"). The error rates of some screening tests are quite high. In some clinical trials, chest x-rays have been able to identify only 40% to 50% of lung cancers present; that is, at least half the tests yielded false negative results. TASK FORCE GUIDE at 136. Mammography and clinical breast examination to detect breast cancer, though recommended for women over 50, *id.* at 73, have been found to yield false positive results in up to 17% of patients. *Id.* at 74-75. In an asymptomatic population, very few test subjects will actually have the target disease, so the vast majority of

positive test results obtained will be false positives rather than true positives. *Id.* at xliv.[5]

In addition, there are distinct risks associated with inaccurate test results. *See* A.B. Miller, *The Ethics, the Risks and the Benefits of Screening*, 42 BIOMEDICINE & PHARMACOTHERAPY 439, 440-41 (1988); William Feldman, *How Serious Are the Adverse Effects of Screening?*, 5 J. GEN. INTERNAL MED. S50 (1990). Patients who receive test results falsely indicating the absence of disease might develop a misplaced sense of security and delay in seeking medical care when symptoms of the disease later manifest themselves. TASK FORCE GUIDE at xliii. False positive results can lead to more invasive follow-up testing that may be uncomfortable and potentially harmful, for example, coronary angiography after a positive screening test for coronary artery disease. *Id.* at xliv, 5-6. Such results can also "label" as diseased persons who are in fact healthy, causing them to suffer anxiety and other difficulties. *Id.* at xliv, 6; *see also* William Feldman, *supra*, at S51-S52.

Even if a test is reasonably accurate in finding disease before it becomes symptomatic, the sobering reality is that—contrary to the assumptions of some courts—for a great many diseases, including many cancers, early

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[5] The Task Force provides this illustration: In a population of 100,000 in which the prevalence of a cancer is 1%, there would be 1,000 persons with cancer and 99,000 without cancer. A screening test that yields 10% false positives and 10% false negatives would detect 900 of the 1,000 cases of the disease, but it would also mislabel 9,900 healthy persons as having cancer. The proportion of persons with positive test results who actually had cancer—the "positive predictive value" of the test—would be only 8.3%. *Id.* at xliv.

This illustration shows why screening tests are much more effective when applied to persons who display symptoms consistent with the target disease than when applied to an asymptomatic group. In a symptomatic population, the prevalance of the disease is much higher, and so the positive predictive value of the test is higher as well.

detection does *not* improve clinical outcomes.[6] *See, e.g.*, TASK FORCE GUIDE at 6 ("there is little evidence that routine screening is an effective means to reduce the incidence of acute coronary events in asymptomatic persons"); *id.* at 123 ("there is currently no evidence that screening for prostate cancer results in reduced morbidity or mortality"); *id.* at 143-44 (no studies indicate that skin cancers discovered by screening have a better outcome than those which present clinically); *id.* at 170 (there is a "lack of evidence for improved outcome with early detection of pancreatic cancer"); *id.* at 188 ("[t]he benefits of early detection of thyroid cancer in the general population are not well defined"); *see also* Philip Cole & Alan S. Morrison, *supra,* at 1263 (notwithstanding the "compelling intuitive appeal of the idea that detection of early cancer will be rewarding," in fact "the difficulty of trying to improve a population's health by screening is immense"); Thomas M. Gill & Ralph I. Horowitz, *Evaluating the Efficacy of Cancer Screening: Clinical Distinctions and Case-Control Studies,* 48 J. CLINICAL EPIDEMIOLOGY 281, 290 (1995) ("the benefits of screening for most cancers have not been convincingly demonstrated with experimental evidence"). In some cases, screening does not improve outcomes because treatment of the target condition in an asymptomatic state is no more effective than treatment after symptoms have become apparent. In other cases, the unfortunate fact is that no effective treatment is available regardless of when the

[6] Data suggesting that screening prolongs the life expectancy of persons in whom disease is detected must be viewed with caution because such data are easily influenced by "lead-time bias": "survival can appear to be lengthened when screening simply advances earlier the time of diagnosis, lengthening the period of time between diagnosis and death without any true prolongation of life." TASK FORCE GUIDE at xlv. In addition, data can be undermined by "length bias," the tendency of screening to detect a disproportionate number of cases of slowly progressing disease and to miss more virulent, fast-moving cases that are present in the population only briefly. *Id.*

disease is detected. Philip Cole & Alan S. Morrison, *supra,* at 1264 ("There is no point in screening for a disease that can be treated successfully after symptoms appear, nor is it reasonable to screen for an untreatable disease."); TASK FORCE GUIDE at xliv-xlvi.[7]

No disease better illustrates the limitations of screening than lung cancer. In several broad-based studies, researchers have found that mortality does not differ between populations that undergo screening and those that do not. TASK FORCE GUIDE at 136-37. Even persons with a substantially increased risk of lung cancer because of exposure to carcinogens in the workplace have not been found to benefit from such screening. "[B]enefit can only be demonstrated if there is a change in mortality. In neither the general population nor in workers with occupational exposures has such benefit been documented." Anthony A. Marfin & Marc Schenker, *Screening for Lung Cancer: Effective Tests Awaiting Effective Treatment,* 6 OCCUPATIONAL MED.: STATE OF THE ART REVIEWS 111, 129 (1991).

The conclusions of the Task Force stand in stark contrast to the enthusiastic views of diagnostic testing that have been offered by courts in embracing the medical monitoring tort. After a comprehensive review of the medical evidence, the Task Force has identified only a handful of screening procedures for which there is persuasive evidence of clinical effectiveness in asymptomatic

[7] Some physicians find benefit in certain screening procedures for reasons that have little to do with the early detection of disease. For example, many practitioners conduct routine physical examinations of their asymptomatic patients because "examining a patient conveys a special sense of caring," helps establish a relationship of "friendship and trust" between doctor and patient, and provides reassurance to anxious patients. Sylvia K. Oboler & F. Marc LaForce, *The Periodic Physical Examination in Asymptomatic Adults,* 110 ANNALS INTERNAL MED. 214, 215 (1989).

patients.[8] Most of these procedures are recommended for all persons within broad age-based categories. TASK FORCE GUIDE at lxii-lxviii.[9] In addition, the Task Force recommends a small number of screening tests for certain high-risk populations (*e.g.*, an HIV test for persons who inject drugs). *Id.* at lxvi.

But for the vast majority of screening tests—including virtually all such tests intended to facilitate the early detection of latent cancers—the Task Force has found either insufficient evidence of effectiveness or affirmative evidence that the procedures are ineffective or even harmful. These include colonoscopy to detect colorectal cancer, *id.* at 98; screening for pancreatic cancer, *id.* at 171; screening for oral cancer, *id.* at 178; urine cytology or other screening tests to detect bladder cancer, *id.* at 184; screening for thyroid cancer, *id.* at 189-90; and electrocardiography to detect asymptomatic coronary artery disease, *id.* at 10. For the cancer that respondent is said to be at special risk of because of his asbestos exposure—lung cancer—the Task Force recommends against the administration of screening tests to asymptomatic persons. *Id.* at 138.[10]

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[8] The Task Force has *not* taken into account the financial cost of the procedures, TASK FORCE GUIDE at lxxxv, although it recognizes that cost may be a factor in clinical decisions, *id.* at li, lxxxv-xcii.

[9] For example, for persons between the ages of 25 and 64, the Task Force recommends measurement of height, weight, and blood pressure; testing of total blood cholesterol for men over 35 and women over 45; a Papanicolaou test for women; fecal occult blood test or sigmoidoscopy for persons over 50; a mammogram for women over 50; an assessment for problem drinking; and Rubella serology for women of childbearing age. *Id.* at lxvi. In addition, the Task Force recommends that the physician administer certain immunizations and chemoprophylaxis and counsel the patient regarding substance use, diet and exercise, injury prevention, sexual behavior, and dental health. *Id.*

[10] The Task Force assigns screening for lung cancer a "D" recommendation, *id.* at 138, which means there is "fair evidence to

Other medical organizations that have studied the matter have reached essentially the same conclusion as the Task Force—the great majority of available screening tests have not been shown to benefit asymptomatic patients. *See, e.g.*, American College of Physicians, *Periodic Health Examination: A Guide for Designing Individualized Preventive Health Care in Asymptomatic Patients*, 95 ANN. INTERNAL MED. 729 (1981); Canadian Task Force on the Periodic Health Examination, *The Periodic Health Examination*, 121 CANADIAN MED. ASS'N J. 1193 (1979); Robert S.A. Hayward et al., *Preventive Care Guidelines: 1991*, 114 ANN. INTERN. MED. 758 (1991) (comparing the conclusions of the Task Force, the American College of Physicians, the Canadian Task Force on the Periodic Health Examination, and the American Cancer Society).

Given the consensus in the medical profession that asymptomatic persons generally benefit only from certain screening tests that are recommended for virtually everyone, the law should not enshrine as an injury worthy of legal protection the supposed "need" of chemically exposed plaintiffs without any manifest illness to undergo special screening beyond what they should receive in any event. The entitlement to special medical monitoring does not remotely enjoy the same status as the personal interests that the law of negligence has traditionally deemed deserving of protection, namely, freedom from bodily and emotional harm. That the law should protect these interests and compensate their negligent invasion in at least some situations is a matter of universal agreement in our society. By contrast, the desirability of special medical screening to detect latent disease in uninjured persons is not simply controversial—it has been generally

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support the recommendation that the condition be excluded from consideration in a periodic health examination," *id.* at 861.

rejected by the very profession to which society traditionally looks for guidance on such matters.[11]

III. THE MEDICAL MONITORING TORT INVITES ENORMOUS NUMBERS OF SPECULATIVE CLAIMS.

Courts that have embraced the medical monitoring tort have in effect rejected the manifest injury requirement as an arbitrary barrier to the compensation of chemically exposed plaintiffs and the deterrence of activities that give rise to such exposure. *See, e.g., Paoli I,* 916 F.2d at 852; *Ayers,* 525 A.2d at 312. But as this Court has noted,

> "characterizing a rule limiting liability as 'unprincipled' or 'arbitrary' is often the result of overemphasizing the policy considerations favoring imposition of liability, while at the same time failing to acknowledge any countervailing policies."

Gottshall, 114 S. Ct. at 2411 (quoting *Cameron* v. *Pepin,* 610 A.2d 279, 283 (Me. 1992)). The policies of compensating plaintiffs and deterring alleged wrongdoing almost always favor the imposition of liability. Courts that have recognized a cause of action for medical monitoring have focused on these pro-liabiilty policies while ignoring or trivializing the considerations that counsel against recognition of this new tort.

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[11] It is no answer to say that some experts, apparently including those who testified for respondent at trial, dissent from the medical consensus on screening for latent disease, and that disputes over a plaintiff's need for such screening should be resolved by the factfinder. The law does not abdicate to individual factfinders the task of defining what constitutes a legally cognizable injury. "Injury" must be defined by the law on a categorical basis. *See Gottshall,* 114 S. Ct. at 2403. Only if a plaintiff's alleged loss satisfies the legal definition of injury does the claim qualify for submission to the factfinder.

A. The Medical Monitoring Tort Gives a Colorable Claim to a Huge New Class of Potential Plaintiffs.

In eliminating the physical injury requirement, the medical monitoring tort bestows a cause of action, virtually immune from summary disposition, on an enormous new class of potential plaintiffs who are not ill and who almost surely will never become ill as a result of the conduct complained of. This at a time when the volume of *conventional* tort claims concerning just one category of hazardous substance, asbestos, has already "burdened the dockets of many state and federal courts, and has particularly challenged the capacity of the federal judicial system." *Georgine* v. *Amchem Prods.,* 83 F.3d 610, 617 (3d Cir.), *cert. granted,* 117 S. Ct. 379 (1996).

Potentially toxic substances are ubiquitous in American society. As of June 1993, the United States Environmental Protection Agency had identified 37,921 potential hazardous waste sites across the nation. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, TWENTY-FOURTH ANNUAL REPORT 293 (1993). During 1993, an estimated 59 million people lived in counties where air pollution levels failed to meet at least one federally mandated air quality standard. *Id.* at 15. Most foods contain pesticide residues. *Id.* at 307. There is probably no work site in the country where potentially hazardous substances are not present, whether in raw materials used in industrial processes, solvents used to clean machinery, pesticides used in agriculture, or the toner used in office photocopying equipment. Many of these substances are transported by rail at some point in the distribution process.

The hazardous substance involved in this case, asbestos, is ubiquitous in ambient urban air. "The air of cities other than that in the vicinity of asbestos processing plants has . . . been found to carry small amounts of asbestos." IRVING J. SELIKOFF & DOUGLAS H.K. LEE, ASBESTOS AND DISEASE 118 (1978). Diesel exhaust, to note just one other substance that is pervasive in the

environment and in the railroad workplace, is also an alleged toxin. *See, e.g., Kichline* v. *Consolidated Rail Corp.*, 800 F.2d 356, 357 (3d Cir. 1986). Modern analytical techniques are able to detect measurable amounts of countless other potentially hazardous substances in the environment and in human bodies.

It is thus no exaggeration to say that most residents of the United States, and probably all railroad workers, are plausible potential medical monitoring plaintiffs. There can be "little doubt that millions of people have suffered exposure to hazardous substances." *Ball* v. *Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990), *aff'd*, 958 F.2d 36, 39 (4th Cir. 1991). On a traditional personal injury claim, the threshold requirement of physical injury or illness sharply limits the universe of potential plaintiffs who can go on to try to prove the defendant's negligence and their entitlement to relief. The nominal threshold requirement erected by the medical monitoring tort—exposure to a hazardous substance—scarcely limits the class of potential plaintiffs at all. Almost everyone who lives in industrial society has been exposed, in some amount, to toxic chemicals. The medical monitoring tort makes all such persons eligible to come to court.

Courts that have recognized the medical monitoring tort have responded to concerns about a potential torrent of claims, if at all, by suggesting that such a result will be prevented by the requirement that plaintiffs prove elements in addition to mere exposure. *See Potter*, 25 Cal. Rptr. 2d at 580; *Miranda*, 7 Cal. Rptr. 2d at 628. This response ignores what happens when medical monitoring claims are actually litigated. Nowadays, "[i]t has become fashionable to add a cause of action for medical monitoring to every mass tort complaint." PAUL D. RHEINGOLD, MASS TORT LITIGATION § 12.2, at 12-2 (1996). Moreover, most courts have read the elements of the tort to impose only the most minimal evidentiary burden on plaintiffs. Unless plaintiffs concede, or have a complete failure of proof on, one of the elements, *e.g.*,

Redland Soccer Club, Inc. v. *Department of Army*, 55 F.3d 827, 848 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996), medical monitoring claims are almost invulnerable to summary judgment.[12] *See* PAUL D. RHEINGOLD, *supra*, § 12.2, at 12-3. Thus, courts rarely can screen out insubstantial claims as a matter of law.

The elements of "significant" exposure and "significantly increased" risk do not require plaintiffs to quantify the extent of their exposure or the degree of increased risk of disease, even in approximate terms. *Paoli II*, 35 F.3d at 788; *Ayers*, 525 A.2d at 309. The requirement of significant exposure has been found to be satisfied by testimony from the plaintiffs that they were present near soil containing a hazardous substance. *Paoli II*, 35 F.3d at 793. It is not even necessary for plaintiffs to demonstrate that toxins were on the *surface* of the soil. It has been found sufficient that the chemicals were detected below the surface and "could" have migrated upward to the surface. *Redland Soccer*, 55 F.3d at 827. Where plaintiffs have offered quantitative estimates of their increased risk caused by an alleged exposure, it has been held that an increased lifetime cancer risk of just 1 in 100,000, *Paoli II*, 35 F.3d at 794, or even as little as 1 in 1,000,000, *Redland Soccer*, 55 F.3d at 847, is enough to qualify as "significant."[13]

Even if the medical monitoring tort were made available only to persons like respondent who have allegedly

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[12] *But see Abuan* v. *General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (holding that plaintiffs failed to create a genuine issue of fact because their experts could not "state how 'significant' or relative the increased risk was for any individual"), *cert. denied*, 510 U.S. 1116 (1994). The Ninth Circuit's approach in *Abuan* has been rejected by the Third Circuit in an influential opinion. *See Paoli II*, 35 F.3d at 788.

[13] In the general population, the lifetime risk that a person will develop cancer is one in two for men and one in three for women. AMERICAN CANCER SOC'Y, CANCER FACTS & FIGURES—1996 at 1. Thus, that a chemical exposure increases a man's risk of cancer by 1 in 1,000,000 means that the risk moves from 50% to 50.0001%.

experienced "massive" exposure to a hazardous substance, *Buckley*, 79 F.3d at 1343, courts would still have no discernible basis for distinguishing "massive" exposures from lesser exposures as a matter of law. The same is true of any attempt to constrain the scope of the tort simply by adding adverbial or adjectival qualifiers to the description of what plaintiffs need to prove. So long as the difference between a compensable claim and a baseless one is a matter of degree, virtually all claims will qualify for submission to the factfinder. *Cf. Gottshall*, 114 S. Ct. at 2409 ("The Third Circuit did require that the emotional injury be 'reasonably' foreseeable, but under the circumstances, that qualifier seems to add little." (citation omitted)).

The requirement to prove in addition that their alleged increased risk creates a need for future medical monitoring will not deter many plaintiffs. Notwithstanding the wide agreement in the medical community that screening for latent disease in asymptomatic persons is generally not beneficial, *see supra* at 13-19, on this, as on other scientific issues that come to court, there are always experts who are willing to testify to fringe views for a fee. *Cf. Stoleson* v. *United States*, 708 F.2d 1217, 1222 (7th Cir. 1983) ("there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic"). In one medical monitoring case, the plaintiffs produced an expert who testified that an expensive program of special medical monitoring is required for "anyone who lived near a toxic dump site . . . even if they lived three blocks away." *Paoli II*, 35 F.3d at 794. Another expert in that case opined that anyone who has been exposed to even one molecule of an allegedly hazardous substance should receive medical monitoring on account of such exposure. *Id.* The Third Circuit in that case held that such opinions were admissible under Rule 702 of the Federal Rules of Evidence and this Court's decision in *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and were

sufficient for the plaintiffs' medical monitoring claims to survive summary judgment. *Paoli II*, 35 F.3d at 793-95.

With the evidentiary burden set so low, there is little to deter enormous numbers of medical monitoring claims. It has been suggested that a plaintiff is not likely to pursue such a claim unless "he or she thinks the [medical] tests are really needed." *Id.* at 788. But many courts, including the Court of Appeals in the present case, have not required that the recovery on medical monitoring claims in fact be used for medical testing. These courts refer to medical monitoring recovery as "damages." *Buckley*, 79 F.3d at 347; *Bocoock*, 819 F. Supp. at 536; *Potter*, 25 Cal. Rptr. 2d at 579; *Meyerhoff*, 534 N.W.2d at 206; *Askey*, 477 N.Y.S.2d at 247; *but see Burns*, 752 P.2d at 34 (medical monitoring recovery should take form of court-administered fund); *Ayers*, 525 A.2d at 313-15 ("encourag[ing]" use of a court-administered fund); *Hansen*, 858 P.2d at 982 (defendants should pay only for medical monitoring services actually provided to plaintiffs). "[D]amage awards do not restrict plaintiffs in the use of money paid as compensatory damages." *Ayers*, 525 A.2d at 314. What little empirical evidence is available suggests that plaintiffs who have received funds in settlement of medical monitoring claims in fact often have not used the money for medical testing. *See* George W.C. McCarter, *supra*, at 257 n.158.

One court has ventured that "the damages available in a medical monitoring claim—the cost of the tests—are not likely to be high enough to provoke a flood of litigation." *Paoli II*, 35 F.3d at 788. There is no basis for such an assumption. In one early case that was tried to judgment, 339 plaintiffs were awarded a total of $8.2 million for future medical monitoring—an average of about $25,000 per plaintiff. *Ayers*, 525 A.2d at 291. In the *Paoli* litigation itself, one of the plaintiffs' experts offered the opinion that the plaintiffs needed to undergo a wide variety of specialized evaluations and tests every

year for "at least 25 years," at a projected annual cost of at $3080 per plaintiff, or $77,000 per plaintiff over twenty-five years.[14] Possible recoveries of this magnitude are more than enough to attract litigants, especially since most courts do not demand highly individualized proof of medical monitoring claims, *see, e.g., Paoli II*, 35 F.3d at 788, making possible the aggregation of hundreds of such claims, *see, e.g., Ayers*, 525 A.2d at 287.

Some plaintiffs, like respondent, will be motivated to press medical monitoring claims largely by the desire to hold apparent wrongdoers "accountable for what they did." *Buckley*, 79 F.3d at 1341. Under traditional tort principles, an alleged wrongdoer could be called to answer in a negligence action only by someone who had sustained physical injury or severe emotional distress allegedly caused by the wrongdoing. The medical monitoring tort in effect confers standing on all persons in the vicinity of a toxic chemical to challenge, if they wish, the conduct of whomever they deem responsible for the presence of the chemical. One need not doubt the sincerity of most plaintiffs to predict that some will abuse that right.

B. Medical Monitoring Claims Are Inherently Speculative, and Threaten Defendants With Arbitrary and Unpredictable Liability.

Traditional tort-law notions of "injury" contain built-in protections against speculative claims. The physical injuries with which tort law has mostly concerned itself are normally susceptible to observation or some other form of objective confirmation. Emotional injuries, although not directly observable, have traditionally been compensated only in circumstances in which they are likely to yield some external corroboration of their existence. *See Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 480 U.S.

[14] *See* Medical Surveillance Program prepared by G. John DiGregorio, M.D., Ph.D., at 4, in *In re Paoli R.R. Yard PCB Litig.*, No. 86-2229 (E.D. Pa.).

557, 569 n.18 (1987). The medical monitoring tort provides no such check on speculative claims. The injury involved—a plaintiff's "need" for future medical testing—has no objective existence.

Courts that recognize the tort have opined that it will not engender speculative claims because plaintiffs must prove their need for future medical monitoring by competent expert testimony. *See, e.g., Paoli I*, 916 F.2d at 850-52; *Ayers*, 525 A.2d at 308-09. But the fact that a claim can be supported by competent expert testimony does not necessarily make it non-speculative.

For example, even courts that accept the medical monitoring tort agree that a claim for the "increased risk" of disease, as such, is too speculative to be allowed, even if competent experts can be found to support such a claim.[15] *E.g., Paoli I*, 916 F.2d at 850-51; *Potter*, 25 Cal. Rptr. 2d at 569 n.15; *Ayers*, 525 A.2d at 304-08. There is no basis for treating a medical monitoring claim any differently. Such a claim requires, as an essential element, proof that the plaintiff is at increased risk of future disease. The speculative character of such proof is not mitigated by requiring, in addition, expert proof of *other* matters. An opinion that a currently healthy plaintiff requires special future medical monitoring is inherently speculative because it necessarily rests on a speculative premise: the existence of some small possibility—perhaps as little as a one-in-a-million chance—that because of a chemical exposure the plaintiff might years in the future develop a disease that might benefit from early detection and treatment. That an expert can put a present-day price tag on the "need" for future medical monitoring to detect such disease does not remove the dominant element of speculation.

The dangers of speculation in medical monitoring claims are especially severe because the opinion that a

[15] An "increased risk" claim seeks recovery for the consequences of a future harm that may, but probably will not, come to pass. *See Bocook*, 819 F. Supp. at 536.

particular plaintiff needs future medical monitoring is not easily subjected to verification or falsification. The expert's opinion is neither an explanation of how scientific phenomena have occurred in the past nor a prediction of how they will probably occur in the future. Because the plaintiff is not currently sick, and will probably never develop any exposure-related illness, the expert has no responsibility to tie his opinion to objective reality. The opinion is pure say-so.

Given the ease with which plaintiffs can make out a triable claim for future medical monitoring, and the speculative nature of the claim, liability will be imposed on defendants, when it is imposed, in a random and unpredictable manner. The medical monitoring tort, like the open-ended version of the emotional-distress tort rejected in *Gottshall*, provides defendants with no meaningful "standard against which to regulate their conduct." *Gottshall*, 114 S. Ct. at 2409. The only standard set up by the medical monitoring tort is: do not negligently allow any chemical exposure that might cause an expert witness to say exposed persons need future medical testing to detect possible latent disease. That, as a practical matter, is no guidance at all. Nor is the bare standard that parties should not engage in negligent conduct enough to guide defendants and prevent arbitrary outcomes, any more than it was in *Gottshall*. *See id.*

C. There Is No Unfairness in Denying a Cause of Action for Medical Monitoring.

By comparison with the physical and emotional injuries that the law of negligence has traditionally compensated, the alleged need of currently healthy persons for special future medical testing has at best only a very weak claim on the limited resources of the judicial system. If one who has been exposed to a hazardous substance eventually does develop a disease that he believes was caused by the exposure, he is entitled (possible problems of claim-splitting aside) to pursue a conventional personal injury claim at that time. *See Simmons*, 674 A.2d at 239. But

when proof of such illness is lacking, there is no compelling reason why the legal system should entertain an exposed person's claim for future medical testing that the medical profession has widely concluded is ineffective, *see supra* at 13-19, and that the plaintiff may elect to forgo in any event, *see supra* at 25.

Moreover, the law should not create an entirely new tort, especially one guaranteed to spawn enormous litigation, where, as here, there is no evidence that the claimed injury cannot be remedied under existing social arrangements. Whereas traditional negligence claims compensate some forms of loss—pain and suffering, for example—that ordinarily cannot be insured against, the cost of medical testing is precisely the type of expense that health insurance is designed to cover. Approximately 85% of all Americans are covered by some form of health insurance. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 120 (1996). Health insurance pays for about 80% of all standard medical bills. *See* 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 379 (1991). To the extent that persons exposed to hazardous substance may have a genuine need for medical testing to detect possible latent disease, most such testing will probably be covered by some form of health insurance.

> [T]here is no strong reason for devising a novel form of early tort intervention to pay for the modest uninsured expenses likely to be incurred by those who were exposed but are not yet diseased.

Id. Where health insurance coverage exists, the medical monitoring tort simply confers a windfall on plaintiffs who are not ill, and are unlikely ever to become ill, because of the defendant's conduct.[16]

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[16] On traditional tort claims, the law ignores the fact that the plaintiff has received insurance benefits from a "collateral source." 4 FOWLER V. HARPER, *supra*, § 25.22, at 651 n.7. *Friends for All Children*, 746 F.2d at 816, though not a true medical monitor-

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully submitted,

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December 16, 1996

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ing case, *see supra* n.4, suggests that the collateral source rule should not apply when plaintiffs seek the cost of future medical testing. There the plaintiffs resided in several European countries, but the trial court awarded the costs of diagnostic testing only to the plaintiffs who resided in France, the only country involved where the public health service was not likely to pay for the testing sought. 746 F.2d at 822 n.7.

(14)

No.96-320

Supreme Court, U.S.
FILED
SEP 16 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AS *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

Filed by Consent of the Parties

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INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with 121 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. PLAC's purpose is to file *amicus* briefs on behalf of its members regarding issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court, and filed a brief in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994).[1]

In *Gottshall*, this Court reiterated that "FELA jurisprudence gleans guidance from common-law developments," 114 S. Ct. at 2403 (quoting *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 568 (1987)). As an organization focused on tort law, PLAC offers unique expertise on those common law developments with respect to emotional distress claims. Moreover, corporate members of PLAC have been party to numerous civil cases involving claims of emotional distress. Because common law courts may glean guidance from the pronouncements of this Court on the standards for emotional distress claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* (1994) -- indeed, as *Gottshall* already has influenced

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[1] The parties' written consents to the submission of this brief have been filed with the Court.

common law standards[2] -- PLAC has a significant interest in this case.

SUMMARY OF ARGUMENT

The court of appeals did not draw lessons from the common law. Indeed, it cited not one common law case applying the zone of danger test, designated in *Gottshall* as the appropriate common law standard for emotional distress claims under FELA. At common law, the zone of danger test focuses on actual or imminent physical harm causing fear. While purportedly invoking that test here, the court of appeals instead scrambled it with the largely repudiated physical impact test in its most diluted form. The resulting new hybrid standard abandoned the focus on actual or imminent physical harm. Based on this novel standard, the court held that exposure to asbestos causing no detectable physical injury placed the plaintiffs in the zone of danger.

With only the most glancing reference to one of the three central policies underlying the common law standards, the court of appeals thereby severed the zone of danger test from its logical moorings and its common law functions. Not only did the court disable the test as a filter for frivolous, fraudulent, and trivial claims, it essentially made its new standard the beginning, middle, and end of the inquiry regarding liability. No longer must a FELA plaintiff in the Second Circuit prove that his or her alleged emotional

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[2] *See, e.g., Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534, 536 (Minn. 1994) (citing *Gottshall* for zone of danger test where plaintiff witnessed best friend's death in accident); *Dickerson v. International United Auto Workers Union*, 648 N.E.2d 40, 50 (Ohio 1994) (discussing policy concerns identified in *Gottshall*); *Kraszewski v. Baptist Med. Ctr.*, 916 P.2d 241, 246 (Okla. 1996).

distress is severe. No longer need the plaintiff show that the distress has physical manifestations. No longer need the plaintiff even provide meaningful objective corroboration of the alleged emotional harm he or she suffered.

The court of appeals' ruling is extreme, and it is perilous. It has flung wide the courthouse doors to all manner of trifling, false, and imaginary claims -- precisely the result that this Court tried to prevent in *Gottshall* and that common law courts have fought for over 100 years.

ARGUMENT

I. THIS COURT AND COMMON LAW COURTS HAVE RECOGNIZED THE NEED TO LIMIT LIABILITY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

One fundamental precept emerges from the common law of negligent infliction of emotional distress -- that emotional distress claims are different from other tort causes of action. They are, unlike most claims of physical injury, ethereal, manipulable, and inextricably intertwined with the normal emotional incidents of everyday life. As this Court recognized in *Gottshall*, those differences have affected the standards of liability at common law, and under FELA. 114 S. Ct. at 2405.

In particular, this Court noted in *Gottshall* the concern of common law courts "that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly

remote consequences of a negligent act." *Id.* (quoting *Maloney v. Conroy*, 545 A.2d 1059, 1061 (Conn. 1988)). These three policy concerns -- a deluge of minor claims, limitless liability, and fraudulent or exaggerated injuries -- have led courts, including this one, to impose a minimum threshold for compensable emotional injuries and to mark outer boundaries delineating who is entitled to recover.

The court of appeals' departure here from the generally accepted application of the zone of danger test does violence to the common law policies embraced in *Gottshall*. It is, therefore, worthwhile to examine those policies in detail, and to assess how courts have historically sought to accommodate them.

A. Courts Have Fashioned Minimum Thresholds to Exclude Minor Claims of Emotional Distress.

Judicial apprehensiveness regarding "a flood of relatively trivial claims," *Gottshall*, 114 S. Ct. at 2405, rests on the fundamental premise at common law that tort law, unlike a railroad, is not a common carrier. Not every injury gets a ride. The law does not, and cannot, afford a remedy for every passing upset, fright, or instance of hurt feelings. In daily affairs, feelings are assaulted constantly by the careless or callous remark, the undeserved reprimand, the social slight. Most of the resulting emotional disturbances, even if caused by the negligence of another, are "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for [them] would unduly burden the courts and the defendants." *Restatement*

(Second) of Torts § 436A cmt. b (1965).[3] Emotional distress, unlike physical injury, is simply part of daily life. Adopting a test, as the court of appeals did here, that does not screen out the teeming multitude of trifling causes of distress would flout this critical lesson of the common law.

B. Courts Have Set Outer Boundaries to Prevent Unlimited Liability for Emotional Distress.

The second judicial concern, limiting who may recover for emotional distress, has also shaped the law in this area. Because every individual is bound to many others in familial, social, and occupational relationships, the emotional consequences of any act of negligence extend much farther than the physical consequences. Describing this concern as "particularly significant," this Court noted in *Gottshall* that, "Emotional injuries may occur far removed in time and space from the negligent conduct that triggers them. Moreover, in contrast to the situation with physical injury, there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act." 114 S. Ct. at 2405.

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[3] *Accord Champion v. Gray*, 478 So. 2d 17, 18 (Fla. 1985) ("[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society") (quotations omitted); *Bass v. Nooney Co.*, 646 S.W.2d 765, 773 (Mo. 1983) (en banc) ("it is unreasonable to require that people act so carefully as to avoid occasionally angering or upsetting others, just as it is unreasonable to demand that one never accidentally jostle another in a crowd") (quotations omitted); *see also* W. Page Keeton, *et al.*, *Prosser & Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984) (hereinafter "*Prosser*").

The modern development of "toxic tort" and fear of disease cases engenders a related concern about unlimited and unforeseeable liability. If 1,000 people are exposed to a chemical posing a one-percent risk of cancer, then 10 people may have a cause of action if they become ill. With fear of disease claims, if the threshold for recovery were merely exposure, all 1,000 potentially could sue. A mass tort would be born. Indeed, if the court of appeals' analysis were applied at common law, countless millions might be able to sue manufacturers of chemicals affecting ozone, based on fear that increased exposure to ultraviolet rays will cause skin cancer. Millions of others exposed to asbestos, or PCBs, or any alleged toxin could lodge similar claims. *See Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 812 (Cal. 1993) ("virtually everyone in society is conscious of the fact that the air they breathe, water, food and drugs they ingest, land on which they live, or products to which they are exposed are potential health hazards"). As the New York Court of Appeals has held, "the problem for the law is to limit the legal consequences of wrongs to a controllable degree." *Tobin v. Gossman*, 249 N.E.2d 419, 424 (N.Y. 1969). A test for emotional distress claims that potentially triggers an avalanche of new lawsuits rejects this guidance of the common law.

C. Courts Have Imposed Concrete Tests to Establish the Genuineness of Emotional Distress Claims.

The third policy concern of common law courts, identified by this Court in *Gottshall*, is the danger of imagined, falsified, or exaggerated claims. 114 S. Ct. at 2405. This concern about genuineness focuses not just on the yes or no question whether the plaintiff suffered *any* mental distress. The finders of fact also must assess the

severity and duration of the alleged distress. Each of these factors is intangible, and each is subjective. Compared to physical injuries, each is harder for doctors, and juries, to identify and measure.

Moreover, the source of concern is not exclusively fakers and frauds. In the words of the Supreme Judicial Court of Massachusetts:

> A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. . . . It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress.

Payton v. Abbott Labs, 437 N.E.2d 171, 175 (Mass. 1982). For example, some persons have a psychological need to blame external factors for their feelings of anxiety or depression.[4] A person's subjective belief that he or she has been psychologically harmed thus does not establish the existence of compensable emotional distress, much less its severity, duration, or relation to the alleged negligence. In

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[4] Barton A. Singer, *Psychological and Forensic Considerations in the Treatment of Post-Traumatic Stress Disorders*, 1 Am. J. Forensic Psych. 3, 5-6 (1983); *see* Douglas B. Marlowe, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 818 (1988).

other words, absent a threshold standard that objectively corroborates any claimed mental disturbance, the hypochondriac prevails. He is injured to the extent he thinks he is.

The inquiry on each of these issues is further complicated because the process of litigation itself may exacerbate an emotional disturbance or impede recovery. *See Stoleson v. United States*, 708 F.2d 1217, 1222 (7th Cir. 1983) ("awarding damages for hypochondria too freely might aggravate those symptoms and thus make litigation itself a source of illness"); Gary B. Melton, *et al.*, *Psychological Evaluations for the Courts* 283 (1987); Singer, 1 Am. J. Forensic Psych. at 5.[5] In cases involving fear of disease, the kind of litigation at issue here, counsel representing the plaintiff often needs to portray the feared event in the most dire terms and, at the very least, to emphasize the likelihood of its occurrence. Such rhetoric can engender or amplify the very fears at issue in the suit.

A threshold test for emotional distress claims that does not police their genuineness thus neglects a principal goal of the common law in this area. The zone of danger test as applied at common law does serve that function. The standard fashioned by the court of appeals does not.

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[5] Additionally, psychiatry recognizes that the prospect of litigation provides incentives to feign, imagine, or exaggerate a mental disturbance. The DSM-IV, the basic text of psychiatric diagnosis, specifically notes that one of the circumstances creating a strong suspicion of such malingering is the "medicolegal context of presentation," that is, the pendency of a lawsuit. American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* § V65.2 (4th ed. 1994).

D. The Zone of Danger Test as Developed at Common Law and as Applied in *Gottshall* Addresses These Policy Concerns.

To resolve the policy concerns discussed above, common law courts have adopted various tests that set minimum thresholds and outer limits on emotional distress claims. In *Gottshall*, this Court adopted one of the most widely accepted of these standards -- the zone of danger test -- for FELA cases. 114 S. Ct. at 2410. Tracing the evolution of the major common law standards in the context of the policies they serve illuminates how the court of appeals misapplied the zone of danger test here.

Initially, recovery for intangible harm was limited to physical pain and suffering. *See, e.g., Peoria Bridge Assoc. v. Loomis*, 20 Ill. 236 (1858); *Johnson v. Wells, Fargo & Co.*, 6 Nev. 558 (1887). By definition, physical injury is a prerequisite for such a claim.

Eventually, courts began to recognize fright as a compensable harm distinct from physical pain and suffering. But the courts "limited recovery for fright to instances in which the plaintiff would be entitled to recovery for pain and suffering, that is, when the plaintiff had suffered an impact." R. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 487 (1982); *see also, e.g., Spade v. Lynn & Boston R.R. Co.*, 47 N.E. 88, 89 (Mass. 1897) (no recovery for "physical injuries as may be caused solely by such mental disturbances, where there is no injury to the person from without").

Limiting recovery for mental distress to these circumstances, however, created a "tension." Pearson, 34 U. Fla. L. Rev. at 487-88. Mental distress can arise absent physical injury to induce it. To ameliorate this tension, some courts soon began to dilute the impact requirement so that the slightest touching, as opposed to outright injury, sufficed to allow recovery for emotional distress.[6] Still, this distension of the impact rule did not resolve the tension. One subjected to severe fright by a high-speed near collision could not recover, while one merely nudged by a bumper at a mile per hour could.

Moreover, this diluted physical impact rule no longer resolved the policy concerns identified above. *See* Germeroth, 40 St. Louis U.L.J. at 220-21 ("courts also found that the impact test inadequately addressed many of the policy concerns justifying its existence and in many ways served to exacerbate them"). Although requiring some impact allowed fact finders to pinpoint the alleged precipitating event, arguably affording some minimal assurances of genuineness, *Prosser* § 54, at 364 ("The true value of the impact requirement may lie in the opportunity which is afforded to the defendant to testify that there was in fact no impact. . . ."), it provided no assurance that the

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[6] *See Prosser* § 54, at 363-64; Thomas P. Germeroth, *Trapped in the Zone: Emotional Distress Claims Under the FELA After Gottshall*, 40 St. Louis U.L.J. 203, 220 ("in an attempt to reward meritorious claims, courts found themselves satisfying the rule with the slightest of impacts and touches which bore no rational relationship to the existence and severity of emotional injuries"). *See also, e.g., Jones v. Brooklyn Heights R.R. Co.*, 48 N.Y.S. 914 (1897) (plaintiff on railroad car allowed recovery for miscarriage brought on by shock where "impact" was a small incandescent light bulb which fell from roof of car); *Zelinsky v. Chimics*, 175 A.2d 351 (Pa. 1961) (jostling of occupants in automobile).

alleged emotional distress was real, rather than falsified, imagined, or exaggerated. *See Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961) ("fraudulent accidents and injuries are just as easily feigned in the slight-impact cases"); *Chivchiolo v. New England Wholesale Tailors*, 150 A. 540, 543 (N.H. 1930) ("it would seem practically as easy to pretend them [distress damages] and as difficult to disprove them in such [slight impact] cases as in cases where there is no impact"). It did not, standing alone, winnow out trivial claims. *See Prosser* § 54, at 361 ("harmless but emotionally disturbing contact" does not ensure that alleged injury merits recompense). Finally -- particularly with some courts treating mere exposure to allegedly toxic substances as a physical impact -- it placed no meaningful outer boundaries on who could recover. *See, e.g., Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 539 (Fla. Dist. Ct. App. 1985) ("Millions of people have been exposed to asbestos. Permitting an action for fear of cancer where there has been no physical injury from the asbestos would likely devastate the court system as well as the defendant manufacturers.").

Because of its many infirmities, reliance on the physical impact test dwindled. *Gottshall*, 114 S. Ct. at 2406 n.7 (listing 5 states); Germeroth, 40 St. Louis U.L.J. at 221, n.120 (listing 6 states). Those states that have applied the physical impact test have generally imposed additional conditions to provide a more reliable threshold test of genuineness than is achieved by the trivialized impact test. In particular, they have insisted that there be some physical manifestation of the emotional distress the plaintiff allegedly

suffered,[7] or that the damages from distress be limited to those directly flowing from the impact.[8]

The more accepted standard for emotional distress claims -- and, most importantly, the one adopted in *Gottshall* for FELA -- is the "zone of danger" test. It resolves the tension inherent in the impact standard, recognizing that "a near miss may be as frightening as a direct hit." *Gottshall*, 114 S. Ct. at 2406 (quoting Pearson, 34 U. Fla. L. Rev. at 488). Thus, the zone of danger test, unlike the physical impact rule, is internally consistent. Fright, fear of imminent physical injury, is the harm recognized as compensable. *Waube v. Warrington*, 358 N.W. 497, 501 (Wis. 1935); *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034 (Minn. 1892). Those placed in imminent danger to their physical safety, who are severely frightened by some immediate menace and suffer lasting emotional effects, can recover. Those who suffer some trivial physical impact posing no immediate threat cannot.

This formulation furthers the common law policies discussed above. First, because the zone of danger test

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[7] *See, e.g., Anderson v. Scheffler*, 752 P.2d 667, 669 (Kan. 1988) ("no recovery unless the emotional distress results in an actual physical injury"). While almost all states have abrogated the physical impact test, a majority of jurisdictions have retained the physical manifestation requirement, in many instances as a further limitation on recovery under the zone of danger test, *see, e.g., Carlson*, 520 N.W.2d at 536. *See also, infra*, pp. 19-20.

[8] *Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980) ("it is necessary that the damages for mental distress sought to be recovered be related to, and the direct and natural result of, the physical contact or injury sustained"); *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991) (the physical injury must cause the emotional distress).

focuses on justifiable fear precipitated by a tangible threat to physical integrity -- a speeding car, a wayward bullet, a falling girder -- it is more likely to sift out petty claims of bruised feelings or emotional upset.[9] Second, the test provides some assurance of genuineness, an objectively verifiable factual scenario that -- unlike a mere touching -- could be expected to produce serious emotional distress.[10] And, third, it is clear and bounded, brightly marking the outer borders of liability while allowing recovery for those plaintiffs most likely to be affected. By defining the class of potential plaintiffs as those who were themselves at risk of imminent physical harm, the rule avoids the impossible task of distinguishing among the infinite number of non-threatening events that might cause emotional distress, and among the multitude of potential plaintiffs who could suffer mental distress divorced from any tangible injury or imminent threat. Further, by identifying the primary compensable harm as fear for personal safety, the rule

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[9] *See Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 4-5 (Ill. 1983) (zone of danger rule should not encourage "frivolous litigation"). Moreover, by recognizing that a near miss may be as frightening as an actual impact, this standard also alleviates the harshness that led some courts applying the pure physical impact rule to trivialize that requirement. *See, e.g., M.B.M. Co. v. Counce*, 596 S.W.2d 681, 686-88 (Ark. 1980) (allowing recovery when impact was "constructive"); *Zelinsky*, 175 A.2d at 354 ("any degree of physical impact, however slight," is sufficient).

[10] *See Bovsun v. Sanperi*, 461 N.E.2d 843, 848 (N.Y. 1984) (adopting zone of danger rule because it uses "an objective test of whether the plaintiff was unreasonably threatened with bodily harm by the conduct of the defendant"); *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980) (reaffirming zone of danger rule because "courts and juries can objectively determine whether plaintiffs were within the zone of danger . . . [and] plaintiffs can be cross-examined regarding whether their fear was for themselves or for another").

advances the goals of FELA.[11] As the Supreme Court stated in *Gottshall*, "the policy considerations of the common law as they are embodied in the zone of danger test best accord with the concerns that have motivated our FELA jurisprudence." 114 S. Ct. at 2411.

II. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF DANGER TEST SEVERS IT FROM ITS COMMON LAW ROOTS AND POLICY GOALS.

In *Gottshall*, this Court described the zone of danger test as limiting recovery to plaintiffs "who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed at immediate risk of physical harm by that conduct." 114 S. Ct. at 2406. The Court also referred to the rule as covering negligent conduct that "threatens [employees] imminently with physical impact." *Id.* at 2411. The court of appeals -- ignoring the context and in particular this Court's focus on imminent physical perils, *id.* at 2410 -- construed the reference to "physical impact" as encompassing a mere touching or bodily contact, rather than immediate injury.[12] *Buckley v. Metro-North Com. R.R.*, 79 F.3d 1337, 1343 (2d

[11] This Court found a third standard, the relative bystander test, inappropriate in the context of FELA. *Gottshall*, 114 S. Ct. at 2411. For one, extending recovery to those who witness the injury of a close family member, as the relative bystander rule does, has little applicability to the railroad workplace. Moreover, the emphasis in FELA "on protecting employees from physical harms [affords] no basis to extend recovery to bystanders outside the zone of danger." *Id.*

[12] The Court in *Gottshall* rejected claims based on "general working conditions" that allegedly yielded emotional distress. 114 S. Ct. at 2409-10. Yet, those general working conditions inevitably involved various and repeated physical impacts.

Cir.), *cert. granted*, 117 S. Ct. 379 (1996). In essence, the court of appeals incorporated into the zone of danger standard the entirely separate diluted physical impact test, without reference to the likelihood of imminent personal harm.

The court of appeals cited no common law case taking this crossbred approach. Nor, indeed, did the court cite a single case interpreting the zone of danger test in any way. It is thus not surprising that the court of appeals' formulation ignores the way the standard evolved, the policies it serves, and the meaning it was afforded in *Gottshall*.

The zone of danger test, as noted, is grounded in the notion of compensating trauma and fright. The zone of danger cases that this Court cited in *Gottshall* -- indeed, zone of danger cases generally -- involve such actual or imminent physical harm causing emotional trauma.[13] A physical impact, a mere touching or even a jostling, would not necessarily cause one to be startled, scared, or traumatized.

[13] *See, e.g., Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (car accident where plaintiff sustained serious physical injury); *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (plaintiff having just exited house saw house lifted from its foundation by gas explosion); *Robb v. Pennsylvania R.R. Co.*, 210 A.2d 709 (Del. 1965) (plaintiff's car stuck in railroad crossing grade as train approached though she abandoned car); *Rickey*, 457 N.E.2d 1 (boy standing next to his brother who was injured); *Stadler*, 295 N.W.2d 552 (no recovery for witnessing accident while standing away from harm); *Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179 (Utah 1992) (no recovery for parent where son was negligently treated at hospital); *Garrett v. New Berlin*, 362 N.W.2d 137 (Wis. 1985) (sister saw brother hit by police car pursuing group of persons of which she was part).

The suggestion that exposure to a toxin is an impact, that it places one in the zone of danger because of gradual or long-term adverse effects that may or, more likely, may not occur, is inconsistent with the very design of this standard as a threshold barrier. It removes the inquiry from common experience, uncouples it from concrete events that universally invoke fear, and divorces it from an imminent physical threat posed with reasonable certainty. Instead, it thrusts the inquiry into a realm where reactions are far more individualized, unforeseeable, and uncertain.

Importing the diluted physical impact test into the zone of danger standard, moreover, revives the policy dilemmas the zone of danger test resolved. As noted, mere bodily contact, without more, does not provide assurances that the mental distress claimed is real. *See supra* pp. 10-11. Promoting mere exposure, rather than physical harm or imminent threat of harm, as a threshold for liability poses no obstacle for trivial or evanescent claims. *Cf. Restatement (Second) of Torts*, § 436A cmt. b (1965) ("~~emotional~~ disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles"). And allowing virtually everyone exposed to a toxic substance to sue for mental distress, absent any evidence of physical injury, potentially imposes liability coterminous with the exposure. If common law courts applied this standard, the pool of potential litigants could include millions of people. *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (observing that "millions of people have suffered exposure to hazardous substances" and civil actions based on exposure alone "could potentially devastate the court system"), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); *Potter v.*

Firestone Tire and Rubber, 863 P.2d at 812 ("enormity of the class of potential plaintiffs cannot be overstated").

Contrary to the court of appeals' suggestion, it is no response that only physical impact sufficient to cause a reasonable person mental distress is compensable. "Reasonableness" is too vague a standard to filter out frivolous or falsified claims, too tied to specific facts and too shorn of objective content to serve as a threshold test of liability. The court of appeals admitted that the determination whether a reasonable person would develop fear based on exposure to an alleged toxin requires the jury to consider "the nature of the toxic substance, its method of transmission to the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." *Buckley*, 79 F.3d at 1344. Thus, if "reasonableness" were the central limiting feature of the applicable standard, if an inquiry like the one the court of appeals envisioned were required in every case, injured parties, tortfeasors, insurers, and their counsel very often would have no way short of litigation to determine whether there was a compensable claim for emotional distress. *See Thing v. LaChusa*, 771 P.2d 814, 821 (Cal. 1989) (criticizing prior California decisions because litigants "had no means short of suit" to determine whether a claim was actionable).

Not only would such a vague standard fail to resolve the problems that have moved courts to limit liability for emotional distress, but it also would unnecessarily extend litigation. A nebulous measure such as "reasonableness" -- particularly with the complex, fact-intensive gloss the court of appeals gave it -- invites disputes of material fact. It thus

reduces the possibility of eliminating meritless claims on summary judgment.[14]

The court of appeals' intimation that the exposure here was somehow different because it was "massive," *Buckley,* 79 F.3d at 1343, provides no more reliable guidance to courts, juries, or litigants. How "massive" an exposure is sufficient to engender a reasonable fear, if it is not sufficient to cause injury? Is "massiveness" a function of the duration of exposure, the quantity of the alleged toxin, or both? Would a single exposure suffice? Would an exposure of one week qualify? One month? Does the standard vary depending on the capacities of the individual exposed? Could an exposure be characterized as "massive" on the ground that it reached many people, or is "massiveness" measured person by person? Does the standard depend on the potency of the alleged toxin or the disease it allegedly causes? The potential questions, and disputes, are legion. What the court of appeals apparently intended as a limitation in fact would complicate and prolong litigation, without meaningfully cabining liability or excluding trivial claims. The court's standard simply squanders the clarity of the zone of danger test.

Applying the zone of danger standard, as the common law has clearly defined it, to people exposed to latent diseases would not leave them without remedy. If they develop the disease, they have a right to sue for that, and compensating for such physical harm is, after all, the focus

[14] *See Knake v. King*, 492 N.W.2d 416, 417 (Iowa 1992); *Gordon v. Alaska Pac. Bancorporation*, 753 P.2d 721, 725 (Alaska 1988). *See generally* Richard A. Posner, *Economic Analysis of Law* 543-44 (1992) (discussing costs of vague standards, including inefficiency because of need to apply the standard in every case, and lack of deterrence).

of FELA. *See Gottshall*, 114 S. Ct. at 2410. But the zone of danger test will deny recovery to plaintiffs for fear of diseases they are not likely to get based on mere exposure to chemicals that did them no harm.[15] That is not an arbitrary outcome. It is an example of a threshold test properly doing its job. *See id.* at 2411.

III. THE COURT OF APPEALS EVISCERATED THE FACTUAL INQUIRY THAT SHOULD OCCUR AFTER THE ZONE OF DANGER TEST IS MET.

The zone of danger test, even properly applied, is not the end of a trial court's inquiry. It is the beginning. Properly conceived, the test provides reassurance regarding the genuineness of emotional distress claims, but not an ironclad guarantee. It increases the likelihood that the claimed distress is severe, but provides no certainty. It delimits who may *not* recover, but does not establish the plaintiff's entitlement to damages. It is, as advertised, a threshold test.

Once the plaintiff clears this threshold, he or she still has to prove the case. The finder of fact -- be it judge or jury -- still must determine whether the claim of emotional distress is serious, authentic, and tied to the negligence of the defendant. Although the inquiry, like any factual review, must be flexible, this Court should provide guideposts.

[15] This case does not present, and this Court need not address, situations where the plaintiff is more likely than not to contract a disease resulting from a toxic exposure. *Cf. Potter v. Firestone Tire and Rubber*, 863 P.2d at 816. In any event, it seems unlikely that an exposure could create such a probability of illness without causing or threatening any immediate injury.

Specifically, even one in the zone of danger created by the defendant's conduct ought not to recover for trifling or fleeting distress, but rather only for serious or severe distress. The court of appeals rejected this proposition, holding that plaintiffs did not have to prove that their distress was severe if they were able to show physical impact. The court suggested that the sole purpose of requiring proof of severe emotional distress is "to guarantee the genuineness of the claim." *Buckley,* 79 F.3d at 1346. Because, in the court's view, the physical impact requirement apparently fulfills this function, proof of severity is unnecessary. This holding is wrong in at least three respects.

First, the severity requirement, in fact, is not intended simply to assure genuineness. As the Court recognized in *Gottshall*, a central policy of the common law, addressed directly by this requirement, is avoiding a "flood of trivial suits." 114 S. Ct. at 2411. The court of appeals simply ignored that policy.

Second, as noted, the court of appeals' application of the "physical impact" text does not, in fact, provide sufficient assurances of the genuineness of the claim. Between 1940 and 1979, as many as 27.5 million people in the U.S. were exposed to asbestos at their workplace. George M. Lordi and Lee B. Reichman, *Pulmonary Complications of Asbestos Exposure*, Am. Fam. Physician 1471 (Dec. 1, 1973). Do all suffer genuine and compensable emotional distress?

Third, the common law in fact has not cast aside the severity requirement when the plaintiff can prove physical impact. Overwhelmingly, in many contexts, the cases have insisted on proof that the plaintiff's emotional distress is

severe.[16] The court of appeals' abandonment of this precondition is extreme. Moreover, it magnifies the infirmities of the diluted physical impact standard the court applies, and throws the courts open to litigation without limits.

Not only have common law courts held fast to the severity requirement, but -- recognizing the vagueness of this factor -- most have gauged the seriousness of emotional distress by whether the plaintiff has exhibited physical symptoms attributable to the mental disturbance.[17] As the Supreme Court of New Hampshire phrased this standard, the plaintiff must allege and prove that he or she suffered

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[16] *See supra* pp. 11-12; *see, e.g., Payton*, 437 N.E.2d at 180 (court requires plaintiffs to show physical harm to limit suits where "only bad manners or mere hurt feelings are involved"); *Stadler*, 295 N.W.2d 552 (to recover, plaintiff must suffer severe mental distress with resultant physical injury); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980) (severe emotional distress); *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970) (severe emotional distress); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983) (emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109 (Ohio 1983) (serious emotional distress).

[17] "Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences . . . the great majority of courts still hold that in the ordinary case there can be no recovery." *Prosser* § 54, at 361. *See, e.g., Muchow v. Lindblad*, 435 N.W.2d 918, 921-22 (N.D. 1989) (insomnia and weight loss were "transitory and inconsequential" and therefore not the requisite "bodily harm"); *Corso v. Merrill*, 406 A.2d 300, 304 (N.H. 1979) (physical symptoms guarantee "that the emotional injury is sufficiently serious to be afforded legal protection"); *Restatement (Second) of Torts* § 436A cmt. b.

physical harm as a result of the conduct causing the emotional distress. *Thorpe v. State Dept. of Corrections*, 575 A.2d 351, 353-54 (N.H. 1990). Further, the harm "must be susceptible to some form of objective medical determination and proved through qualified medical witnesses." *Id.* at 353 (quoting *Corso v. Merrill*, 406 A.2d 300, 304 (N.H. 1979)).

Physical manifestation of injuries is thus useful in distinguishing serious from insubstantial emotional distress. It also provides additional assurance that the claim is genuine.[18] That the physical manifestation requirement is overinclusive -- that it might let through its screen some claims of emotional distress which in fact are not genuine or serious -- suggests only that it is best used as urged here, as one factor in a factual analysis undertaken *after* the threshold zone of danger standard has been met. The contention that the physical manifestation criterion is underinclusive -- that it may exclude legitimate claims of emotional distress which happen not to be accompanied by any physical symptoms -- has been asserted, but not proved. As the *Restatement (Second) of Torts* notes, physical consequences are a hallmark of serious harm to psychological health. *Restatement* § 436A cmt. b. This evidentiary guidepost is thus closely linked to the policies of the common law and of FELA.

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[18] Claims of mental anguish unaccompanied by physical injuries "are more often assumed than real -- and the suit too liable to be wholly speculative." *Ruth v. Fletcher*, 377 S.E.2d 412, 415 (Va. 1989). The Supreme Court of Rhode Island, despite recognizing advancements in the field of psychiatry, reaffirmed its requirement of physical symptomatology on this basis: "because of the nature of the illness it is too difficult to substantiate absent objective physical symptomatology." *Reilly v. United States*, 547 A.2d 894, 897 (R.I. 1988).

The court of appeals' conclusion that proof of physical impact should obviate this inquiry, as well as the general requirement of severity, makes no sense. It, too, amplifies the flaws of the court's jerry-rigged zone of danger test. The court compounded the problem even further by effectively dispensing with any objective corroboration of the plaintiff's claimed mental distress. The court asserted that the mere act of complaining about the exposure, without more, provided all the substantiation needed to meet the threshold test. *See Buckley*, 79 F.3d at 1346. The argument is a *non sequitur*. As a matter of logic, that a plaintiff complained about exposure to asbestos does not show, or even tend to show, that his claimed fear of disease is real. The disgruntled worker, the hypochondriac, the charlatan, are as likely to complain as a person in genuine distress. *See supra* pp. 7-8.

CONCLUSION

The court of appeals fashioned a new hybrid test that conflicts with common law standards, ignores the critical lessons of the common law, and clashes with the basic goals of FELA. PLAC urges that the Court reverse the court of appeals' decision and reaffirm the zone of danger standard as this Court adopted it just two years ago.

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December 16, 1996

Supreme Court, U.S.
FILED
DEC 16
CLERK

(15)

No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

The Port Authority of New York and New Jersey ("Port Authority") is a body corporate and politic created in 1921 by a Congressionally-consented-to Compact between the States of New York and New Jersey to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 Stat. 174 (1921), *consenting to* 1921 N.J. Laws ch. 151 *and* 1921 N.Y. Laws ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§ 6401-23 (McKinney 1979). At the present time, pursuant to the 1921 Compact and subsequent bi-State legislation, the Port Authority owns and/or operates thirty-three (33) such facilities, including, through its wholly-owned subsidiary, the PATH interstate railway system. *See* N.Y. Unconsol. Laws § 6612 (McKinney 1979).

The operation of the PATH system is regarded as an essential governmental function for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws § 6610 (McKinney 1979). As an interstate railway system, PATH is often a defendant in cases brought pursuant to the statute at issue, the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60. Hence, the interests of *Amicus* are directly affected by the ruling of the Second Circuit at issue in the instant case.

The Port Authority is particularly concerned about the impact on it, and on other similarly situated companies and public authorities, of the kind of vague and open-ended liability imposed on rail operators by the Second Circuit. If a worker who suffers no physical injury can nevertheless recover for the negligent infliction of emotional distress under FELA, simply and solely because the plaintiff was negligently exposed to pollutants or toxic substances in the workplace, railroads will be faced with vastly expanded, and

possibly devastating, potential tort liability. *Amicus* asserts that the result upsets the carefully crafted remedial scheme that FELA represents and undoes the limitations on recovery for emotional distress inherent in that scheme that were set out by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). Accordingly, the Port Authority respectfully submits the instant Brief *Amicus Curiae* pursuant to Rule 37(4) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in Petitioner's brief.

SUMMARY OF ARGUMENT

FELA has a broad remedial purpose and it is appropriate to interpret it liberally. The Second Circuit, however, has exceeded the liberality of Congress and ignored the admonitions of this Court by erroneously establishing a "physical impact" rule that would permit employees negligently exposed to asbestos to sue for emotional distress. The ruling is punitive rather than compensatory in its intent and effect. Furthermore, the Second Circuit's holding that medical monitoring awards are permissible violates the statutory language of FELA, which limits recovery to cases of actual injury. In short, the ruling below was designed to address an unusual set of allegations, but did so in a way that potentially has broad and unfortunate implications for the entire railroad industry. For these reasons, *Amicus* respectfully submits that the ruling should be overturned.

ARGUMENT

I. THE COURT BELOW HAS ADOPTED A RULE OF LAW GOVERNING THE NEGLIGENT INFLICTION OF EMOTIONAL HARM IN FELA CASES THAT IS INCONSISTENT WITH THIS COURT'S INTERPRETATION OF THE STATUTE, AND IGNORES THE NEED TO TAKE INTO ACCOUNT NOT ONLY A PLAINTIFF'S INTERESTS, BUT ALSO A DEFENDANT'S LEGITIMATE NEED FOR PROTECTION AGAINST FRIVOLOUS SUITS AND UNPREDICTABLE AND OPEN-ENDED LIABILITY

In the decision below in *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337, 1344-45 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996), the Court of Appeals for the Second Circuit ruled that a plaintiff suing under FELA may recover for emotional distress and medical monitoring if he or she has been "physical[ly] impact[ed]" by asbestos fibers, even though the plaintiff has not developed, and, fortunately, as statistics indicate, probably never will develop, any disease as a consequence of that exposure. *Amicus* respectfully submits that this reading of the law is in derogation of the rule recently established by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), is inconsistent with the common law, and poses a serious economic threat to all rail operators subject to FELA.

Claims of negligent infliction of emotional distress are recognized as compensable in modern tort law, but not without, at the same time, generating considerable anxiety about the potential for serious mischief that would be posed if the right to recover for this tort were too broadly defined.

As this Court observed in *Gottshall*, claims for emotional distress divorced from physical injury pose risks both of fraud and of the trivialization of the legal process through the proliferation of insignificant disputes. 512 U.S. at 545. Even more serious is the risk that "allowing such suits can lead to unpredictable and nearly infinite liability for defendants." *Id.* at 552.

In light of these concerns, and in an effort to remain faithful to the intent of Congress in enacting FELA -- "to provide compensation for the injuries and deaths caused by the *physical* dangers of railroad work," 512 U.S. at 555 (emphasis added) -- this Court limited recovery under the Act for emotional distress to those plaintiffs who could show that they fell within a "zone of danger," *i.e.*, that they were threatened with imminent physical peril. *Id.* at 556. *Amicus* respectfully refers this Court to Point II of Petitioner's brief which amply demonstrates that the Second Circuit's "physical impact" analysis, *see Buckley*, 79 F.3d at 1343-45, distorts the "zone of danger" test adopted in *Gottshall*.

This Court's adoption of the "zone of danger" test frankly recognizes that even individuals who indisputably have suffered serious, palpable emotional scarring as a result of negligence may nonetheless be without legal redress because their situation does not place them within a narrowly delimited class of permissible claimants. Although the result can be harsh toward some plaintiffs, this Court noted in *Gottshall* that it was required to reach such a result by the need to balance the interests of plaintiffs and defendants in a

way that respects the objectives of Congress in enacting FELA. 512 U.S. at 557. Thus, this Court stated:

> Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. Although some of these grounds have been criticized by commentators, they all continue to give caution to courts. *We believe the concerns that underlie the common-law tests, and particularly the fear of unlimited liability, to be well founded.*

Id. (emphasis added).

As this Court recognized in *Gottshall*, the state courts, operating under common law, have recognized that the need for predictability and a reasonable restriction on the scope of potential liability demands that this cause of action be carefully limited -- despite the fact that some convincing claims of harm will be left without redress. *See* 512 U.S. at 545-46; *see also Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989) (*in bank*) (repeatedly cited with approval by this Court in *Gottshall*); *Bovsun v. Sanperi*, 461 N.E.2d 843, 847 (N.Y. 1984); *Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179, 1182 (Utah 1992).

Unfortunately, in deciding *Buckley,* the Second Circuit forsook the teaching of this Court and gave no heed to this Court's effort to keep liability under FELA for negligent infliction of emotional distress within reasonable bounds. As a result, entities such as the *Amicus* may face wholly incalculable levels of future liability unless this Court corrects the Second Circuit's error and reverses its ruling.

If the Second Circuit's ruling stands, any employer who is found inadvertently, but negligently, to have allowed its employees to be exposed to a harmful pollutant or toxic substance, such as asbestos, is likely to be liable to each and every person so exposed for emotional harm and for medical monitoring. Clearly, under the Second Circuit formulation, recovery will not even be limited to cases in which there is a showing of severe distress. The Second Circuit was quite willing to allow a plaintiff with "injuries" like the Respondent's to recover, even though the court openly conceded that the "evidence of Buckley's emotional distress is not overwhelming." *Buckley,* 79 F.3d at 1346.

II. THE COURT BELOW REACHED A WRONG AND PUNITIVE RESULT

In truth, what seems to have motivated the Second Circuit to reach its erroneous interpretation of the applicable legal standard is not some basic disagreement with the proposition that a tort like the negligent infliction of emotional distress needs carefully and narrowly defined boundaries. Rather, it seems to have occurred as a result of the Second Circuit's reaction to Respondent's allegations of egregious wrongdoing on the part of his employer.

More specifically, the Court of Appeals describes the Respondent as emerging from the steam tunnels under Grand Central Station day after day so covered with white asbestos dust that he and his co-workers were dubbed the "'snowmen of Grand Central.'" *Id.* at 1340. *Buckley* is described as "an unusual case" involving an exposure to asbestos that was "massive, lengthy, and tangible" and, furthermore, the allegations are that this exposure occurred with the knowledge of Metro-North and without any prior warning to the workers. *Id.* at 1340, 1345. Indeed, the Court of Appeals was sufficiently upset by these allegations that it openly acknowledged being unmoved by the possibility that its holding could lead to a "flood of litigation." *Id.* at 1345. Clearly the Second Circuit was outraged by the allegations regarding Metro-North's behavior. Quite tellingly, the Court remarked:

> We do not believe that the magnitude of Metro North's wrong should limit the damages awarded against it.

Id. It is precisely this sense of outrage that most pointedly demonstrates the erroneous nature of the Second Circuit formulation and the need for reversal. *Amicus* respectfully submits that liability for negligent infliction of emotional distress under FELA should not depend on perceptions, right or wrong, of the egregiousness of a defendant's conduct.

However distasteful the picture of the Petitioner's behavior, as presented in the opinion below, it should be remembered that it is only that -- a picture painted by the Respondent's presentation alone. *See Buckley*, 79 F.3d at 1342. In reality, the facts of the case have yet to be determined. No ultimate findings of fact exist because the District

Court directed a verdict for Metro-North at the close of the Respondent's case. *Buckley v. Metro-North Commuter R.R.*, No. 89 Civ. 7170-A, 1995 WL 110380, at *1 (S.D.N.Y. Mar. 15, 1995), *vacated*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996). And most importantly, no issue of liability or damages based on any claim of intentional wrongdoing was before the Second Circuit. On the contrary, the sole issues the court was asked to address were whether, based on simple negligence, Petitioner could be required to compensate its employees for (i) emotional distress and (ii) medical monitoring if they are exposed to asbestos at some indeterminate level above normal background amounts. *See Buckley,* 79 F.3d at 1342, 1346.

Amicus wishes to point out that instead of limiting itself to the narrow issues legitimately before it, the Second Circuit seems to have allowed its distaste for Petitioner's conduct to support a vast departure from and distortion of the traditional principles of tort law. The holding that workplace exposure to asbestos constitutes a "physical impact" sufficient to sustain a claim of negligent infliction of emotional distress, in addition to being legally flawed, serves the purpose of punishing Metro-North rather than compensating Respondent. After all, Respondent complains of no physical injury and can offer no evidence of clinical disease. Indeed, the Second Circuit acknowledged that "Buckley cannot demonstrate a probability that he will develop an asbestos-related disease." *Buckley*, 79 F.3d at 1343 n.1. Moreover, Respondent does not even claim severe emotional distress -- only anger and anxiety. *Id.* at 1341. The court itself admitted that the evidence of Respondent's emotional distress was "slim." *Id.* at 1346.

III. IRRESPECTIVE OF WHETHER THE "PHYSICAL IMPACT" STANDARD FOR IMPOSITION OF LIABILITY IS CORRECT, RECOVERY FOR MEDICAL MONITORING COSTS IS NONETHELESS INAPPROPRIATE

Compensation for medical monitoring is not a remedy for a claim of existing emotional distress. It is intended to deal with a different issue, *i.e.*, the risk that a physical ailment will develop at a future date. But because the disease does not exist at the time of the suit, requiring railroads to compensate workers for ongoing monitoring is incompatible with the statutory requirement of FELA that plaintiffs be permitted to recover only for actual injuries.

More specifically, FELA provides that

> [e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .

45 U.S.C. § 51.

Nearly a half century ago, this Court in *Urie v. Thompson*, 337 U.S. 163, 170 (1949), interpreted this statutory language to hold that a worker exposed to a potentially harmful substance was not injured within the meaning of FELA. In accord is *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied,* 474 U.S. 864 (1985).

Luckily, most exposures to harmful or toxic substances in the workplace and elsewhere will never result in the development of disease in most people. And in the case of those unfortunate enough to suffer adverse consequences, the expression of illness may not occur -- as has been the experience with asbestos -- until decades after the time of exposure. If employers subject to FELA are required to pay for future medical monitoring for every employee who stands even a slightly increased statistical risk of developing an illness related to workplace exposure, employers will become the suppliers of regular medical checkups for vast numbers of present and past employees at an astronomical potential cost. This Court clearly said in *Gottshall:*

> That FELA is to be liberally construed . . . does not mean that it is a workers' compensation statute. We have insisted that FELA "does not make the employer the insurer of the safety of his employees . . . ."

512 U.S. at 543 (citation omitted). Quite clearly, the rule enunciated by the Second Circuit would go well beyond even what caused this Court concern in *Gottshall.* It would, in effect, turn the employer into a medical insurer.

Not surprisingly, *Amicus* is unaware of precedent establishing that workers' compensation laws, which, as does FELA, ordinarily require "injury"[1] as a predicate to recovery, go as far as the Second Circuit's ruling extends FELA. And certainly the common law of torts generally has not demanded that employers engage in medical monitoring -- particularly in cases where the Respondent has, as his own experts

[1] *See, e.g.*, N.Y. Work. Comp. Law § 10 (McKinney 1992).

testified here, at most a five percent (5%) risk of ever developing an asbestos-related disease. *Buckley*, 79 F.3d at 1341. *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1371 (S.D. W. Va. 1990), *aff'd sub nom. Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

As the District Court most persuasively stated in *Ball*:

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants.

755 F. Supp. at 1372.

Thus, *Amicus* respectfully submits that were employer liability for medical monitoring, under the circumstances presented in *Buckley*, to become a generally-accepted remedy under FELA, employers such as *Amicus* would face incalculable costs. Moreover, should the common law courts take heed of this Court's admonition in *Gottshall* that common law principles inform its FELA analyses, 512 U.S. at 540, 541-42, 557, and the *Buckley* remedy thereby become common to the law of torts, the court system itself, as the *Ball* court recognized, could be overwhelmed by the ensuing great increase in levels of litigation.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges the Court to reverse the judgment of the Second Circuit Court of Appeals and remand with directions to enter judgment as a matter of law in favor of Petitioner.

Dated: New York, New York
December 13, 1996

Respectfully submitted,

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No. 96-320

Supreme Court, U.S.
FILED
DEC 19 1996
CLERK

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Supreme Court of the United States
OCTOBER TERM, 1996

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MICHAEL BUCKLEY,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in this country, Congress structured a tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers. No-fault workers' compensation systems now cover all other industries and workers except railroad employees and seamen.[1]

Each year several thousand FELA lawsuits are filed against AAR members, and many more claims are settled before a suit is filed. AAR's members expend substantial sums of money defending FELA claims and suits and in the payment of FELA settlements and verdicts, far more, by any reasonable standard of comparison, than is spent by other industries in connection with compensating employees for work related injuries.[2]

The Second Circuit's decision in *Buckley* v. *Metro-North Commuter Railroad*, 79 F.3d 1337 (2d Cir. 1996), is of particular concern to AAR's members. The ruling below circumvents the carefully crafted limits on liability in emotional injury cases established by this Court in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), and opens the door to an entirely new class of FELA claims. As a result, it exposes railroads to the

[1] Seamen are covered under FELA by virtue of 46 U.S.C. § 688.

[2] Private industry as a whole pays about $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 2-2 (May 1996) (CLAIM & LITIGATION REPORT). Over the past five years, AAR members have spent, on average, $1.2 billion on FELA annually, or about 3.7 per cent of their gross revenues. CLAIM & LITIGATION REPORT (calendar years 1991, 1992, 1993, 1994, 1995).

potential for far greater liability than was intended under FELA as interpreted by this Court.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

SUMMARY OF THE ARGUMENT

In *Gottshall*, this Court recognized a cause of action for negligent infliction of emotional distress under FELA, but held that it was available only in the limited circumstances when the plaintiff satisfies the common law zone of danger test. In *Buckley*, the court ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate risk of physical injury. This ruling seriously misreads and misapplies *Gottshall*.

Under the zone of danger test, in order to recover, the plaintiff's emotional distress must arise as a result of being placed in imminent risk of physical harm. Buckley's alleged distress did not arise from such circumstances, but rather as a result of exposure to an environmental condition that did not create the risk of imminent harm, and, at most, resulted in a slightly increased risk of some future harm. Moreover, there was no evidence that Buckley suffered from any present physical injury. Common law courts have held, with near unanimity, that under the zone of danger test, or any other legal theory, there is no cause of action for negligent infliction of emotional distress based on exposure to an allegedly harmful environmental condition in the absence of present physical injury as a result of such exposure.

If allowed to stand, *Buckley* will significantly and improperly expand railroad liability under FELA. While

the Second Circuit purported to limit its decision to the particular circumstances of the plaintiff's case, it enunciated no principles offering guidance as to when a claim for negligent infliction of emotional distress, alleged as a result of a workplace exposure, would be cognizable. To the contrary, its holding is a prescription for virtually unlimited liability.

Nor would *Buckley* be limited to cases where exposure to asbestos is alleged. In addition to thousands of FELA claims alleging exposure to asbestos that have been filed by rail employees, in recent years rail employees have filed approximately two thousand FELA claims alleging exposure to other substances or environmental conditions in the workplace that allegedly cause future ill health effects, such as diesel exhaust, silica dust and solvents. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness. If *Buckley* is overruled, however, all of these employees will continue to have a remedy for damages under FELA should they eventually develop an injury or disease as a result of such exposure.

ARGUMENT

I. THE SECOND CIRCUIT MISAPPLIED *GOTTSHALL* AND THE ZONE OF DANGER TEST

The Second Circuit ruled that a railroad employee who was exposed to asbestos on the job may maintain a cause of action for negligent infliction of emotional distress under FELA despite the fact that he has no asbestos-related disease, displays no clinical evidence of physical injury, and was exposed to no immediate risk of physical injury. 79 F.3d 1337 (1996). This ruling seriously misreads and misapplies this Court's decision in *Gottshall*, rendering FELA a statute devoid of any recognizable standard, and dramatically expanding railroads' liability

for non-physical injuries. By this ruling, the Second Circuit flings wide open the door to "unpredictable and infinite liability" this Court closed in *Gottshall*. *See Gottshall*, 114 S. Ct. at 2411.

A. Gottshall Placed Substantial Limits on Recovery for Negligent Infliction of Emotional Distress Under FELA

In *Gottshall*, this Court acknowledged that a cause of action for negligent infliction of emotional distress could exist under FELA, but held that the common law and the statutory context of FELA placed substantial limitations on the circumstances under which such a cause of action is available. The Court adopted from the common law the bright line zone of danger test as most compatible with FELA's historic emphasis on physical injuries. The Court described the test as follows:

> [A] worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries—physical and emotional—caused by the negligent conduct of their employers that threatens them imminently with physical impact. This rule will further Congress' goal in enacting [FELA] of alleviating the physical dangers of railroading. 114 S. Ct. at 2410-11.

The Court explained what the test meant: "[t]hat is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" *Id.* at 2406 (quoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 489 (1982)).

The zone of danger test permits those who are imminently threatened with physical injury from an accident, i.e., are in the zone of danger, to recover for the emo-

tional distress caused by the accident. This Court stressed in *Gottshall* that the bright line zone of danger test was necessary because, unlike claims for physical injuries that present objective, identifiable harms, emotional distress claims present "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Gottshall*, 114 S. Ct. at 2411. Restricting recovery to plaintiffs in the zone of danger, as defined by courts at common law, is consistent with both FELA's focus on the physical dangers of railroading and the important policies, acknowledged by this Court, that call for limitations on the tort of negligent infliction of emotional distress. *Id.* Plaintiffs who come within the zone of danger, are less likely to assert trivial or fraudulent claims; moreover, permitting claims by such plaintiffs will not raise the specter of unlimited and unpredictable liability. *Id.* Where the plaintiff is outside the zone of danger, the right to recover for negligent infliction of emotional distress is cut off in order to advance these important goals. *Id.*

Gottshall adopted a well established common law test for claims of negligent infliction of emotional distress under FELA. Cases at common law clearly establish that plaintiffs, like plaintiff in the case at bar, who allege exposure to a deleterious substance which *may*, at some future time, result in a compensable injury, do not fall within the traditional zone of danger test. Such plaintiffs are not put in imminent risk of physical harm, and they experience no fright or distress that arises due to a near miss.[3] In sharp contrast to plaintiffs coming within the zone of danger, in these cases the alleged distress appears some time after the alleged exposure, in some case many years, when the plaintiff learns of facts suggesting that an

[3] In *Gottshall*, the Court took note of the rationale for the zone of danger test: that "a near miss may be just as frightening as a direct hit." 114 S. Ct. at 2406.

injury may occur at some future time, causing the plaintiff to become distressed.

Nonetheless, the Second Circuit held that Buckley experienced a "physical impact" sufficient to satisfy the zone of danger test, identifying that "physical impact" as Buckley's exposure to asbestos. *Buckley*, 79 F.3d at 1343. Yet, as the court acknowledged, and as Buckley's own doctors testified, that "impact" did not result in any physical injury or in any clinical manifestation of asbestos exposure, and gave rise to at most a minimal increased risk that Buckley would develop an asbestos-related illness. *See id.* at 1343-44. The Second Circuit's unprecedented notion of "physical impact," under which it justified recovery for emotional distress, consisted of an environmental condition that did not manifest itself in physical injury, that did not place the plaintiff at risk of imminent physical injury, and that did not cause him to fear imminent physical injury.[4] "Such an encompassing definition of impact would undercut th[is] Court's desire to draw reasonable limits to employer liability for emotional distress

[4] Under the common law, "impact" for purposes of the zone of danger test is a "violent physical contact, a striking together, a collision." *Williams v. Baker*, 572 A.2d 1062, 1064 n.8 (D.C. 1990); *see also Mitchell v. Hadl*, 816 S.W.2d 183, 184 (Ky. 1991) ("physical contact"); *OB-GYN Assocs. v. Littleton*, 386 S.E.2d 146, 148 (Ga. 1989) ("actual bodily contact"). Thus, common law courts applying the zone of danger test generally permit only those plaintiffs involved in or threatened with traumatic impact-producing accidents to recover for emotional distress. *See, e.g., Dobelle v. National R.R. Passenger Corp.*, 628 F. Supp. 1518, 1521, 1525 (S.D.N.Y. 1986) (fifteen-foot section of steel rail that struck and penetrated passenger train); *Keck v. Jackson*, 593 P.2d 668, 668-70 (Ariz. 1979) (automobile accident); *Towns v. Anderson*, 579 P.2d 1163, 1165 (Colo. 1978) (en banc) (gas explosion that lifted house off its foundation); *see also Niederman v. Brodsky*, 261 A.2d 84, 90 (Pa. 1970) (plaintiff may recover for emotional distress under zone of danger theory only if he "was in personal danger of physical impact because of the direction of a negligent force against him and [he] actually did fear the physical impact").

claims." *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530, 535 (3d Cir. 1995), *on remand from* 114 S. Ct. 2396 (1994).

Exposure to environmental conditions in the workplace typically does not satisfy the zone of danger test because it does not involve an "immediate risk of physical harm." *See Garcia v. Burlington Northern R.R. Co.*, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (under *Gottshall*, zone of danger "is a location in which the plaintiff is 'at immediate risk of physical harm' ") (citations omitted); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (plaintiff not in zone of danger when near worker who had punched other workers because "threat of injury" to plaintiff "was not immediate" but was "both speculative and remote"); *see also Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 78-79 (3d Cir. 1991) (railroad worker outside the zone of danger—a mile away from train collision—could not recover for fright and emotional distress); *cf. Simmons v. Pacor, Inc.*, 674 A.2d 232, 238 (Pa. 1996) ("cases which base recovery upon an 'impact' rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to [another]" and "are not analogous" to asbestos exposure cases where "no physical injury to any party has been established").

In short, if the *Buckley* decision is permitted to stand, the clear limits and finite range of the zone of danger test will be lost, and the rule of law established will be equivalent to that expressly rejected by this Court in *Gottshall*.

B. FELA Must Be Guided by Common Law Precedent, Which Does Not Support the Second Circuit's Ruling

Gottshall makes clear that common law principles must guide lower courts' application of FELA. Although it

is considered a broad remedial statute, FELA does not float freely, adrift from all precedent. Rather, as this Court made abundantly clear in *Gottshall*, interpretations of FELA must be guided by the common law. The Second Circuit's fundamental error was that it ignored common law precedents in order to effectuate its exceedingly broad and mistaken construction of FELA's "remedial" purpose, precisely what this Court admonished must not be done. 114 S. Ct. at 2408.[5]

While there has been a tendency to interpret FELA expansively to effectuate its remedial purpose, this Court has admonished that such interpretations are limited by the statute's language and construction. *Id.* In enacting FELA in 1908, and in subsequent amendments, Congress lowered the then existing common law barriers to recovery by abrogating the defenses of assumption of the risk, the fellow servant doctrine and contributory negligence.[6] However, this Court has been equally clear that where Congress has not specifically altered the common law, it is common law concepts that guide the inquiry. "The 'merit' of a FELA claim of this type cannot be ascertained without reference to the common law." *Id.*[7] For example, in

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[5] The Second Circuit cited only three common law cases to support its ruling, *Hagerty v. L&L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir. 1986); *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (C.P. Ohio 1987) and *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D. Ill. 1983), two of which are clearly distinguishable because the plaintiff suffered a physical injury (*Hagerty* and *Lavelle*), and the other of which was disavowed by subsequent case law in the jurisdiction (*Wetherill*).

[6] 45 U.S.C. § 53 (contributory negligence); 45 U.S.C. § 54 (assumption of the risk); *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) (FELA abrogated the common law fellow servant doctrine.).

[7] In her dissent in *Gottshall*, Justice Ginsburg pointed out that the common law test adopted by the court was not universal, noting that there is no unitary common law, but rather that states have adopted different rules to address tort liability. 114 S. Ct. at 2418.

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988), the Court declined to find that prejudgment interest was available under FELA, reasoning that Congress had not explicitly provided for it and that it generally was not recognized at common law when FELA was enacted.[8]

Common law precedent confirms that there is no cause of action for negligent infliction of emotional distress under these circumstances. Courts frequently have considered—and rejected—claims for negligent infliction of emotional distress arising from exposure to harmful substances where there is no evidence of any physical injury or illness. These cases have overwhelmingly held that occupational exposure does not satisfy the zone of danger test because there is no traumatic accident, no immediate physical injury, no fear of imminent physical injury, and no imminent risk of disease. *See, e.g., Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 592 (5th Cir. 1986) (Louisiana law); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (Pennsylvania law); *Nutt, v. A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983), *affd*, 480 A.2d 647 (Del. 1984) (Delaware law).

Indeed, whether applying the zone of danger or any other test, federal and state courts applying state common law are virtually unanimous in holding that occupational exposure such as that at issue here, without present physical injury or the substantial likelihood of developing a

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While it is true that the zone of danger test is not followed in all states, the ruling of the Second Circuit is nowhere the law.

[8] Just last term this Court refused to give FELA an expansive interpretation simply to assure recovery when such an interpretation was not supported by the statute. *Norfolk & Western Ry. Co. v. Hiles*, 116 S. Ct. 890 (1996) (a misaligned drawbar does not constitute a violation of the Safety Appliance Act which would result in liability as a matter of law under FELA).

disease in the future, cannot support a claim for negligent infliction of emotional distress. *See, e.g., Ball v. Joy Techs., Inc.*, 958 F.2d 36, 38 (4th Cir.) (no recovery under Virginia law for negligent infliction of emotional distress because "mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle plaintiffs to recover for their emotional distress"), *cert. denied*, 502 U.S. 1033 (1992); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (New Jersey and Pennsylvania law) (no recovery for negligent infliction of emotional distress absent physical injury caused by asbestos exposure or physical manifestation of the feared disease); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (no cause of action for emotional distress based on asbestos exposure in the absence of actual compensable harm); *Bondy v. Texas Eastern Transmission Corp.*, 701 F. Supp. 112, 114 (M.D. La. 1988) (requiring present PCB-related injury as predicate to recovery for mental anguish arising from exposure to PCBs), *aff'd*, 872 F.2d 422 (5th Cir. 1989); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987) (no recovery for emotional distress and fear of cancer for plaintiffs with no asbestos-related disease, because "[j]ustice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease"), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Mergenthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (in asbestos exposure case, present physical injury required in order to state claim for mental anguish); *Doner v. Ed Adams Contracting, Inc.*, 617 N.Y.S.2d 565, 566 (N.Y. App. Div. 1994) (denying recovery for emotional distress to plaintiff exposed to asbestos who did not show likelihood of contracting disease as result of exposure); *see also Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 848 (3d Cir. 1995) (Pennsylvania law) (no recovery for emo-

tional distress for uninjured plaintiffs exposed to toxic wastes in soccer field that was formerly a landfill), *cert. denied*, 116 S. Ct. 772 (1996); *cf. Locke v. Johns-Manville Corp.*, 275 S.E.2d 900, 904-05 (Va. 1981) (in determining whether suit was timely filed, court opines that action for cancer arising from asbestos exposure does not accrue until plaintiff suffers actual physical harm; "legally and medically there was no injury upon inhalation of defendants' asbestos fibers").

There simply is no basis for ignoring the overwhelming case law in order to provide an unprecedented and unique remedy to rail employees.

II. THE SECOND CIRCUIT'S UNPRECEDENTED DECISION WILL HAVE A SIGNIFICANT IMPACT ON THE RAILROAD INDUSTRY

The likely consequence of the Second Circuit's decision in *Buckley* is that thousands of perfectly healthy railroad employees will be able to bring a heretofore unrecognized FELA claim based only on their concern that at some future time they might contract a disease. While it is difficult to predict how various state and federal courts will handle this new form of case, significantly, the *Buckley* decision offers no principles to guide future courts. Nor does it offer any basis by which liability might be predicted or limited.

A. The Second Circuit's Decision Establishes No Standards By Which To Limit Future Claims

The Second Circuit attempted to downplay its expansive and unwarranted interpretation of the zone of danger test by suggesting that *Buckley* was an unusual case, and its holding was thereby very limited. Under the Second Circuit's decision in *Buckley*, the only limit on the recovery of damages for emotional distress arising out of occupation exposure is that workers exposure be "massive, lengthy, and tangible." *Buckley*, 79 F.3d at 1345. This

kind of informal and unscientific assessment hardly affords an objective standard for determining whether a claim may proceed to trial. (In fact, the record in *Buckley* shows undisputably that there was no objective evidence documenting the level or quantum of plaintiff's exposure.) This Court's adoption of the zone of danger test in *Gottshall* expressly was predicated on the Court's rejection of such subjective types of standards and of the concomitant liability. *Gottshall*, 114 S. Ct. at 2408-09; *see also id.* at 2409 (warning that under such fact-specific tests, "[j]udges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts").

Under *Buckley*, if any medical or scientific evidence can be proffered showing a possible link between a substance or environmental condition and future harm, any rail employee who alleges what he or she thinks is substantial exposure to such a substance or condition and claims to be upset as a result would state a prima facie case. *Buckley* offers no rational way to determine what level, dose or duration of exposure would be necessary to support a claim.[9] In fact, the court actually dispensed with any requirement that there be any objective way to determine what level of exposure has occurred.[10] As a result, the plaintiff's testimony as to the level of exposure and a doctor's opinion, based on such testimony, that there exists a small increased risk of future illness might suffice to raise a triable issue on a claim of negligent in-

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[9] The levels of exposure associated with a risk of developing different conditions can differ. *See In Re Hawaii*, 734 F. Supp. at 1566 n.3.

[10] The court termed Buckley's exposure "massive," while acknowledging that there were no "verifiable clinical signs of asbestos exposure." 79 F.3d at 1344. *See also* Joint Appendix at 196 (plaintiff's expert testifying that Buckley had no clinical evidence of asbestos exposure).

fliction of emotional distress.[11] Moreover, there would be no requirement of any physical manifestation of injury.

B. Under *Buckley* Many Perfectly Healthy Railroad Employees Will Have FELA Claims Despite the Fact That They Will Never Become Ill

The unprecedented holding in *Buckley* will have significant consequences for the railroad industry. Although asbestos has not been generally used in the railroad industry for years, rail employees continue to bring large numbers of FELA claims alleging injury from exposure to asbestos, since the latency period before manifestation of disease, if it occurs at all, can be up to 40 years. Since 1990, over 14,000 new asbestos claims have been brought against American railroads.[12] In many of these cases the plaintiff, in fact, suffers no disease, or at least not one caused by exposure to asbestos. Nonetheless, all of these plaintiffs have alleged exposure.

If *Buckley* is allowed to stand, it will not matter if an employee exhibits any disease or symptoms or if there is any medical evidence of exposure. He or she will only need to allege "massive" exposure. Further, it is likely that employees who have not made claims heretofore, because they are not injured, will consider actions based on the *Buckley* ruling. Under *Buckley*, whether or not they have symptoms, these employees would all be in a position to assert that the railroad is liable for damages for emotional distress they suffer over the prospect of future illness. There would be no need to demonstrate even the slightest present health effects caused by their alleged exposure. While the facts surrounding those alleged ex-

[11] Buckley's doctor quantified the increased risk of cancer at one to three percent. 79 F.3d at 1341.

[12] Data on the number of occupational claims have been supplied to AAR by its large member railroads.

posures may be different, the Second Circuit's legal analysis provides no way to distinguish Buckley's exposure from the exposure of other rail employees.

Nor does anything in *Buckley* limit its holding to asbestos exposure. Many hundreds of additional FELA cases have been brought alleging exposure to other substances, which at some point have been alleged to cause injury. Since 1990, over 2000 FELA claims have been filed alleging exposure to various toxic substances (other than asbestos).[13] Some of the more common examples include: diesel exhaust, *see e.g., Summers v. Missouri Pacific R.R. Co.*, 897 F.Supp. 533 (E.D. Okl. 1955); silica dust, *see e.g., Wooden v. Missouri Pacific R.R. Co.*, 862 F.2d 560 (5th Cir. 1989); and chemical solvents, *see e.g., Ulfik v. Metro North Commuter R.R.*, 77 F.3d 54 (2nd Cir. 1996); *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499 (9th Cir. 1994).[14] In fact, as the rail industry becomes a safer place to work, FELA claims alleging traumatic injury are fast being replaced by claims alleging an occupational illness, usually brought about by some alleged long term exposure to a deleterious environmental condition.

Given *Buckley*'s expansive and standardless ruling, these rail employees too would be in a position to bring emotional distress claims, and get them to a jury, simply

[13] *See supra* note 12.

[14] There is certainly controversy and dispute over whether the substances which form the bases for the recent wave of FELA exposure claims do, in fact, cause disease. In many jurisdictions evidence, even if not generally accepted in the medical and scientific community, might be proffered even if it would not be admissible under the standards established by this Court in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993). Since plaintiffs may bring and maintain FELA suits in state court, *see* 45 U.S.C. § 56 and 28 U.S.C. § 1445(a), this Court's decision in *Daubert*, which held that under Federal Rule of Evidence 702 expert testimony must be both reliable and relevant, might not necessarily act as a limitation on the kinds of evidence that may be submitted.

by alleging some degree of exposure to some substance allegedly linked to increased risk of disease, though the overwhelming majority of these employees are perfectly healthy, and will remain so. The *Buckley* decision does not require that there be anything other than a deminimis increased risk that the plaintiff will ultimately contract a disease as a result of the exposure.[15] *Buckley* would support awarding damages for emotional distress to numerous rail employees who testify that they are angry and upset as a result of alleged exposure to a substance in the workplace, which, through some medical testimony, can be linked to the possibility of some future disease.

If *Buckley* is overturned, any of these employees who do eventually develop an illness that can be causally linked to workplace exposure will not be deprived of a remedy. They would then have a cause of action under FELA, and would be able to recover all damages suffered, both for physical and mental injury. For example, since 1990, the railroad industry has paid out about $135 million to employees claiming to suffer from asbestos related disease.[16] *Buckley*, however, gives the vast majority, who will never becomes ill, the same right of access to damages.

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[15] *See supra* note 11.

[16] *See* CLAIM AND LITIGATION REPORT (calendar years 1990-1995).

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Court of Appeals for the Second Circuit in this case should be reversed.[17]

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[17] While AAR has addressed only Buckley's claim for negligent infliction of emotional distress, AAR fully supports Petitioner's position that medical monitoring is not available as a remedy under FELA. (*See* Pet. Br. at point IV).

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

(17)

NO. 96-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Insurance Association ("AIA") is a national trade association representing more than 250 companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA member companies are affiliated with 79,000 independent insurance agents nationwide. The purposes of AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains seven regional offices, and retains legislative counsel in every state.

In this case, AIA believes that the United States Court of Appeals for the Second Circuit erred by upholding a cause of action for negligent infliction of emotional distress in the absence of any showing of physical or emotional injury. Respondent's cause of action is contrary to sound public policy and would jeopardize both the judicial system and the insurance industry in their common goal of compensating those who are actually injured. AIA also believes that the Second Circuit incorrectly ruled that the respondent could recover for the costs of future medical monitoring. For these reasons, AIA appears as amicus curiae to urge this Court to reverse the decision of the Second Circuit to permit respondent to recover damages for negligent infliction of emotional distress and the costs of future medical monitoring.

SUMMARY OF ARGUMENT

In *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), this Court established that plaintiffs could bring actions for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, only if they satisfied the common law zone of danger test. In other words, to recover for negligently-inflicted emotional injury, a

plaintiff either had to suffer an actual physical injury or at least be "placed in immediate risk of physical harm." *Gottshall*, 114 S. Ct. at 2406. Despite the clear teaching of *Gottshall*, the Second Circuit allowed respondent to pursue his claims of emotional injury even though he had never suffered a physical injury and was never in danger of suffering any immediate physical injury. The Court of Appeals reached this result by ignoring the requirement -- implicit in the zone of danger test and the other common law rules considered in *Gottshall* -- that in order to recover, the plaintiff must have been in danger of suffering either a direct hit or a near miss from some imminent threat. In so doing, the Court of Appeals created a regime in which exposure to a hazardous substance alone can give rise to claims for emotional injury. That decision has the effect of creating new torts for "fear of cancer" and "medical monitoring," and expands liability for negligently-inflicted injury well beyond the limits carefully crafted by this Court in *Gottshall*. This Court should reaffirm *Gottshall* and reverse the Second Circuit's ruling.

ARGUMENT

I. RESPONDENT DOES NOT HAVE A VALID CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

A. Respondent Does Not Have a Cause of Action Under *Gottshall* Because He Never Suffered Any Injury Nor Was He Ever Placed in Imminent Danger of Any Immediate Physical Injury.

In *Gottshall*, this Court traced the development of the law of negligent infliction of emotional distress from an absolute requirement of physical injury to modern expansive notions of liability like the bystander rule. The history of the tort underscores one requirement that has been constant over time and across jurisdictions: the plaintiff or his proxy must be placed in an imminent and immediate physical danger that gives rise to fright and emotional distress. Rather than allow

recovery for all varieties of emotional injury, courts have permitted recovery only for fright and emotional distress caused by either an actual physical injury or, as this Court put it in *Gottshall*, "a near miss." In this case, respondent never was put in any danger of immediate injury. Instead, he seeks to recover for the anxiety associated with a future event that may never occur -- the possibility that he may contract cancer. There is no basis for such a recovery under *Gottshall*: Without some imminent and immediate danger, *Gottshall* and its zone of danger rule do not impose liability.

1. The Zone of Danger Test Adopted by This Court in *Gottshall* Requires Proof of an Imminent Danger of Immediate Physical Injury.

The historical evolution of the tort of negligent infliction of emotional distress confirms that courts consistently have limited recovery to those situations in which the plaintiff either suffered an immediate physical injury or was placed in danger of suffering an immediate physical injury. Originally, a plaintiff could recover for emotional injuries only if he also suffered physical injuries. Without an actual physical injury from the traumatic event, no recovery would lie. *See, e.g.*, *Victorian Rwys. Comm'rs v. Coultas*, 13 App. Cas. 222 (P.C. 1888); *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Spade v. Lynn & B.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897); *see also Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. 1983) (*en banc*) (explaining that under the traditional rule there was no recovery "unless the plaintiff suffered a contemporaneous traumatic physical injury"). In other words, although emotional distress could provide an additional element of damages for another tort involving a distinct physical injury, it was not an independent basis for liability.

Although some courts relaxed the requirement of physical injury and began to talk more loosely about the requirement of "physical impact," they continued to require a threat of imminent and immediate physical injury. What was relaxed

was the extent of the physical injury actually suffered, but the threat of an immediate and grave injury remained essential. *See, e.g.*, *Simmons v. Pacor, Inc.*, 543 Pa. 664, 677, 674 A.2d 232, 238 (1996) ("Those cases which base recovery upon an 'impact' rather than injury involve plaintiffs who have witnessed a traumatic physical injury . . . ."); *Grube v. Union Pac. R.R. Co.*, 256 Kan. 519, 526, 886 P.2d 845, 850-51 (1994) (denying recovery despite allegation of impact because alleged emotional distress did not result from fear of imminent danger to plaintiff's safety). Under these cases, an individual who escaped the full brunt of a threatened imminent injury, but nonetheless experienced some physical impact from the cause of the physical danger, could bring a cause of action for fright and emotional distress.

At the same time that some courts began to recognize increasingly trivial physical impacts as sufficient to allow recovery, others rejected the physical impact rule as an arbitrary limitation on liability and adopted the zone of danger test. Both the willingness to recognize trivial physical impacts as sufficient and the adoption of the zone of danger test reflected the reality that "'a near miss may be as frightening as a direct hit.'" *Gottshall*, 114 S. Ct. at 2406 (*quoting* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982)); *see also Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994) (observing that both the stretching of the definition of physical impact and the adoption of the zone of danger test reflected the same impulse). Importantly, under the zone of danger test, as in cases of physical impact short of injury, the relevant near miss is a near miss of imminent harm.[1] The zone of danger

[1] As the Minnesota Supreme Court recently explained:

> [C]ases permitting recovery for negligent infliction of emotional distress are characterized by a reasonable anxiety arising in the plaintiff, with attendant physical manifestation, from being in a situation where it was abundantly clear that plaintiff was in grave personal peril for some specifically defined period of time.

K.A.C. v. Benson, 527 N.W.2d 553, 558 (Minn. 1995).

test, as its name implies, requires that the plaintiff be "placed in immediate risk of physical harm" by the defendant's negligent conduct. *Gottshall*, 114 S. Ct. at 2406; *see also Gaston v. Flowers Transp.*, 866 F.2d 816, 820 (5th Cir. 1989) (denying recovery under zone of danger test because plaintiff never feared imminent threat to his safety); *Garcia v. Burlington N. R.R. Co.*, 137 Or. App. 385, 389, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) ("The zone of danger is a location in which the plaintiff is at 'immediate risk of physical harm.'") (*quoting Gottshall*, 114 S. Ct. at 2406); *Vaillancourt v. Medical Ctr. Hosp., Inc.*, 139 Vt. 138, 143, 425 A.2d 92, 95 (1980) (denying recovery because no showing of threat of immediate injury); *Rodrigues v. State*, 52 Haw. 156, 170-71, 472 P.2d 509, 519 (1970) (noting that "the courts have been reluctant to award damages for mental distress unless it is accompanied by physical injury or the immediate threat of physical injury to the plaintiff"); *Falzone v. Busch*, 45 N.J. 557, 559, 214 A.2d 12, 17 (1965) (noting that the zone of danger test, then in force in New Jersey, limited recovery to situations in which "negligence causes fright from a reasonable fear of immediate personal injury"); *United States v. Hambleton*, 185 F.2d 564, 565 (9th Cir. 1950) (observing that Washington law required that "the act causing the mental fright or emotional distress also . . . threate[n] immediate bodily harm").

Other courts have expanded the scope of liability even further by adopting the so-called relative bystander rule, which allows a plaintiff to recover for emotional injuries sustained in witnessing injuries suffered by a close relative. *See generally Gottshall*, 114 S. Ct. at 2408. However, even the relative bystander rule does not dispose of the requirement that there be an injury or threat of imminent injury, it merely allows physical injury to a close relative to suffice. *See, e.g.*, *Simmons*, 543 Pa.

at 677, 674 A.2d at 238; *Thing v. La Chusa*, 771 P.2d 814, 829 (Cal. 1989) (en banc). In short, throughout the development of the tort of negligent infliction of emotional distress, an imminent threat of immediate physical harm to either the plaintiff or his proxy has remained a necessary element of recovery.

After surveying the law of negligent infliction of emotional distress, *Gottshall* adopted the zone of danger test as the appropriate benchmark. *See Gottshall*, 114 S. Ct. at 2410. In so doing, the Court limited recovery to plaintiffs "who are placed in immediate risk of physical harm." *Id.* at 2406. Lower courts applying *Gottshall* routinely have denied recovery to plaintiffs who were never in danger of suffering such imminent harm. *See, e.g., Bloom*, 41 F.3d at 911 (denying recovery under *Gottshall* because plaintiff "was neither placed in immediate risk of physical harm nor threatened imminently with physical impact"); *Marschand v. Norfolk & W. Rwy.*, 876 F. Supp. 1528, 1535 (N.D. Ind. 1995) (limiting recovery to damages caused by fear for plaintiff's safety), *aff'd*, 81 F.3d 714 (7th Cir. 1996); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (applying *Gottshall* and denying recovery because there was no showing of threat of immediate harm); *Garcia v. Burlington N. R.R. Co.*, 137 Or. App. 385, 389, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (denying recovery because plaintiff had never been "at 'immediate risk of physical harm'") (*quoting Gottshall*, 114 S. Ct. at 2406). As *Gottshall* concluded: "Railroad employees thus will be able to recover for injuries -- physical and emotional -- caused by negligent conduct of their employers that *threatens them imminently with physical impact*." *Id.* at 2411 (emphasis added). In short, although *Gottshall* recognized that liability for negligent infliction of emotional distress includes near misses as well as direct hits, *Gottshall* did not expand liability to include plaintiffs who were never at risk of suffering a direct hit.

2. Respondent Cannot Recover Because He Was Not in Imminent Danger of Suffering an Immediate Physical Injury.

Respondent cannot recover for his emotional injuries because he never endured any event with the potential for imminent calamity. In other words, respondent cannot recover because he never entered the zone of danger. Instead, respondent was exposed to a substance that, while posing no immediate danger, may create future complications and future physical injuries. It is possible, but by no means likely, that such exposure may eventually provide the basis for a tort action in which respondent can recover for both his physical and emotional injuries. But that exposure, standing alone, does not support an independent action for emotional distress under the zone of danger test adopted by *Gottshall*.

The Court of Appeals mistakenly allowed respondent to pursue his cause of action by disposing of *Gottshall*'s requirement that the plaintiff be "placed in immediate risk of physical harm." *Gottshall*, 114 S. Ct. at 2406. The Second Circuit divorced the phrase "physical impact" from its common law context and the context in which this Court used the phrase in *Gottshall*, and allowed respondent to pursue his claim because he had "physical impact with asbestos."[2] By viewing "physical impact" in a vacuum, the Second Circuit was able to convert exposure to asbestos into a sufficient impact to allow respondent to go forward with this action, notwithstanding that the asbestos did not pose any threat of immediate injury and

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[2] At the risk of parsing the Court of Appeals' opinion too finely, its choice of preposition seems significant. The Court of Appeals generally uses the somewhat awkward phrase "physical impact *with* asbestos," rather than the more natural "physical impact *from* asbestos." The reason for this preference is clear: There is no objective, clinical evidence of any physical injury, impact or effect *from* respondent's exposure to asbestos. There is only impact with, which is to say exposure to, asbestos. The common law, however, required more than mere exposure to something: It required a physical injury or impact *from* the defendant's conduct.

even though respondent was never in the zone of danger. This reasoning reflects a fundamental misunderstanding of *Gottshall* and, if left uncorrected, would result in a massive expansion of liability for negligent infliction of emotional distress.

By divorcing the physical impact test from the requirement that the plaintiff must be threatened with imminent injury, the Second Circuit has interpreted the physical impact test to be less demanding than the zone of danger test. That outcome gets it exactly backwards. As this Court recognized in *Gottshall*, the zone of danger test "was recognized as being a progressive rule of liability that was less restrictive than the physical impact test." *Gottshall*, 114 S. Ct. at 2410; *see also Waube v. Warrington*, 216 Wis. 603, 608, 258 N.W. 497, 499 (1935) (referring to the zone of danger test as "the liberal rule"). Indeed, this observation was critical to the Court's holding in that the "progressive" nature of the zone of danger test was held to be "more consistent than the physical impact test with FELA's broad remedial goals." *Gottshall*, 114 S. Ct. at 2410. *Gottshall*, therefore, makes it clear that the zone of danger test marks the outer boundaries of the tort of negligent infliction of emotional distress. As respondent was never placed in danger of immediate harm, he has no right to recovery under *Gottshall* despite his "impact" with asbestos.

The Court of Appeals' error may have stemmed from *Gottshall*'s expression of the zone of danger test as providing a cause of action for "'those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.'" Pet. App. 17a (*quoting Gottshall*, 114 S. Ct. at 2406). The Court of Appeals may have placed undue weight on this Court's use of the disjunctive. However, when read in the context of this Court's understanding of the two tests and the historical evolution of the tort, it is clear that *Gottshall* used the phrase "physical impact" to describe an impact from conduct that posed an "immediate risk of physical harm." *Gottshall*, 114 S. Ct. at 2410.

The Court of Appeals' mistaken interpretation of "physical impact" is further underscored by the common law cases applying the physical impact test. Most courts that have retained the physical impact test continue to demand an actual physical injury. Impact short of injury does not suffice. *See, e.g., Grube*, 256 Kan. at 529, 886 P.2d at 852 (surveying cases); *Hammond v. Central Lane Communications Ctr.*, 312 Or. 17, 25, 816 P.2d 593, 597 (1991); *OB-GYN Assoc. v. Littleton*, 259 Ga. 663, 666, 386 S.E.2d 146, 149 (1989) (overruling *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928)). Respondent's lack of any physical injury would doom his claim in these jurisdictions. To be sure, other courts demonstrated remarkable ingenuity in stretching the definition of "impact." But they did not dilute the physical impact test to the point at which exposure suffices. Rather, they demanded that the physical impact -- no matter how slight -- flow from conduct that posed a risk of imminent calamity. *See, e.g., Zelinsky v. Chimics*, 196 Pa. Super. 312, 175 A.2d 351 (1961) (treating minor jostling from low-speed collision as impact). The effect was to stretch the impact test to the point where it allowed recovery for the vast majority of near misses.[3]

The Court of Appeals' analysis not only reflects a misunderstanding of *Gottshall*, but also effects a substantial expansion of liability. The zone of danger test limits recovery to a particular kind of emotional distress: the emotional trauma caused by nearly suffering a physical calamity. As one common law court put it, not all fright is compensable, only

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[3] However, most of the States that initially diluted the physical impact test went on to adopt the zone of danger or relative bystander tests. "As courts increasingly adopted the zone of danger test, the need to stretch the definition of physical impact dissipated." *Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994). As a consequence, since *Gottshall* did adopt the zone of danger test, its use of the term physical impact should be interpreted in the traditional sense of actual injury. Otherwise, to employ both the no-matter-how-trivial version of the physical impact test and the zone of danger cases is to engage in double-counting, which could lead to a vast expansion of liability.

that "which arises from a reasonable fear of immediate personal injury to oneself." *Dulieu v. White & Sons*, 2 K.B. 669 (1901); *see also Grube*, 256 Kan. at 527, 886 P.2d at 851 (recovery under *Gottshall* limited to those who "suffer imminent apprehension of physical harm"); Pearson, 34 U. Fla. L. Rev. at 489. Physical impact, therefore, must be read as a physical impact from something that could cause an immediate injury. *See, e.g., Gottshall*, 114 S. Ct. at 2411. The Second Circuit divorced the "physical impact" test from the context of imminent threats. In so doing, it vastly expanded liability by allowing plaintiffs to recover for any emotional injury that is in any way associated with a physical impact.

Moreover, in light of the elasticity of the concept of "physical impact," the decision under review has the potential to open up liability for negligent infliction of emotional distress in almost any situation where the plaintiff can allege negligence. This would be directly contrary to the result reached in *Gottshall*. *Gottshall* recognized that the common law did not allow for the recovery of all types of negligently-inflicted emotional injury. Instead, the physical impact and zone of danger tests permitted a narrow class of plaintiffs to recover for a particular type of emotional distress. Outside these narrow "pockets of liability," the common law generally did not permit recovery. *See* Pearson, 34 U. Fla. L. Rev. at 513.[4] To expand liability to cover emotional distress caused by factors other than fear of immediate injury would throw open the floodgates that the Court carefully kept closed in *Gottshall*.

[4] The other "pockets of liability" were from negligent acts committed in the course of a pre-existing relationship that put the defendant on notice of the obvious potential for emotional distress. Pearson, 34 U. Fla. L. Rev. at 513. The handful of cases allowing recovery for the negligent mishandling of a corpse by an undertaker provide an example.

3. At Bottom, Respondent Seeks to Recover on a "Fear of Cancer" Claim That is Not Actionable Under *Gottshall*.

Respondent's claim is, in reality, a suit to recover damages for "fear of cancer." However, fear of cancer represents a fundamentally different kind of emotional distress than that recognized under the zone of danger test. The zone of danger test involves backward-looking anxiety stemming from a single event. Fear of cancer, by contrast, involves forward-looking anxiety about the uncertain possibility of developing a disease. As one court has explained, the zone of danger test allows recovery for "mental anguish engendered by a proven traumatic ordeal which did not result in physical injury," while a fear of cancer claim attempts to recover for "mental anguish arising from fear of future complications." *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (distinguishing fear of cancer cases and denying recovery for fear of cancer absent physical injury). Unlike the fright caused by nearly suffering an immediate physical injury, the fear of developing a potential future harm was not one of the "pockets of liability" for which recovery was allowed at common law. To the contrary, fear of cancer claims are still controversial in even the most progressive common law courts and were completely unknown to the common law at the time of FELA's passage in 1908. Therefore, in light of *Gottshall*'s focus on the common law at the time of FELA's passage, FELA should not be interpreted to include a "fear of cancer" tort.

Like the bystander rule rejected in *Gottshall*, a tort for emotional injury from the fear of cancer was not part of the common law at the time of FELA's enactment. Courts did not even begin to contemplate such a tort until the 1970's, and most continue to reject requests to create a "fear of cancer" tort. *See, e.g., O'Banion v. Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992) (observing that "there is no Oklahoma case law which addresses whether damages may be recovered for the fear of an increased risk of developing cancer

later in life," and rejecting such a claim as overly speculative); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 195 (Ky. 1994) ("[M]ere ingestion of a toxic substance does not constitute sufficient physical harm upon which to place a claim for damages."); *DeStories v. City of Phoenix*, 154 Ariz. 604, 744 P.2d 705 (Ariz. Ct. App. 1987) (no recovery for fear of cancer from exposure to asbestos dust). While some courts will allow fear of future cancer as an element of damages, they demand proof of an independent physical injury sufficient to give rise to an independent tort. *See, e.g., Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994) (surveying fear of disease law and stressing importance of an independent physical injury), *cert. denied*, 115 S. Ct. 727 (1995); *Adams*, 783 F.2d at 593 (denying recovery in absence of "mental anguish caused by a physical injury proven to exist"); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (rejecting "a claim based on fear of future injury alone without accompanying asbestos-related physical injury"); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) (denying recovery for asbestos-related injuries prior to any manifestation of bodily injury), *cert. denied*, 474 U.S. 864 (1985); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984) (no recovery without physical injury).[5] These courts' reluctance to establish an independent cause of action for fear of cancer is well-founded. As discussed in the following two sections, such a cause of action would create liability that is both unpredictable and virtually unlimited.

In the asbestos context, courts have refused to recognize a fear of cancer claim for plaintiffs who have experienced only

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[5] The Court of Appeals acknowledged these cases requiring an independent physical injury and attempted to bring this case within their scope by reiterating its finding of a "physical impact" from exposure. Pet. App. 21a-22a. This was clear error. In the context of fear of disease cases, the courts have not equated the physical injury requirement with physical impact, but have required a physical injury sufficient to bring an independent tort.

pleural thickening from exposure to asbestos. *See, e.g., Simmons v. Pacor Inc.*, 543 Pa. 664, 674, 674 A.2d 232, 237 (1996). Instead, courts have required, at a minimum, a showing that the plaintiff suffers asbestosis before permitting a recovery for fear of cancer. *See, e.g., Capital Holding Corp.*, 873 S.W.2d at 195. If this Court were to allow a fear of cancer claim for respondent, who has not even experienced pleural thickening (itself not a harmful condition), it would put itself well out in front of the States in this developing area of the law. Under these circumstances, there is no basis for allowing recovery for fear of cancer under FELA.

Finally, respondent's claim would fail even if it were brought in one of the few jurisdictions that have recognized fear of cancer actions. The States that have authorized such actions well recognize the potential for nearly limitless liability created by allowing fear of cancer suits in an age when seemingly everything causes cancer. Accordingly, those jurisdictions place demanding requirements on plaintiffs. For example, although the California Supreme Court has allowed plaintiffs to bring claims for negligent infliction of emotional distress to recover for fear of cancer, it permits such a recovery only if the plaintiff can show "by reasonable medical and scientific opinion, that it is *more likely than not* that cancer will develop in the future due to the toxic exposure." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 997, 863 P.2d 795, 816 (1993) (emphasis added). Here, respondent's own experts put his increased risk of cancer at between 1 and 5 percent.[6] It is crystal clear, therefore, that even in one of the few jurisdictions to recognize an independent tort for fear of cancer, respondent could not come remotely close to satisfying the threshold for bringing a cause of action.

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[6] One of respondent's own experts testified that the possibility that he will die from cancer increased by no more than between one and three percent. His other expert set the range at between one and five percent. *See* Pet. App. 3a-4a.

B. Respondent Remains Free to Bring a Claim Should He Ever Suffer an Actual Injury.

In *Gottshall*, this Court confronted the question of whether the plaintiffs could sue for negligently-inflicted emotional injuries. Each plaintiff's alleged emotional harm in the consolidated cases before the Court in *Gottshall* stemmed from a completed event. Therefore, the question in *Gottshall*, as in all cases in which the plaintiff alleges harm from a past traumatic event, was whether the plaintiffs could recover for the emotional distress associated with a specific incident, in other words, whether the plaintiffs had any cause of action arising out of the facts alleged in their complaints.

This case arises in a very different context. The question here is not *whether* respondent can sue, but *when*. There is no doubt that if respondent does, in fact, suffer a physical injury from his exposure to asbestos, he will be able to bring a cause of action to recover not only for his physical injuries, but also for any emotional injury. In that event, he will be compensated for all his injuries arising from his exposure. The only question for this Court is whether respondent should be allowed to sue now, before he has suffered any physical injury. As the Pennsylvania Supreme Court recently stressed, denying recovery for fear of cancer claims does not mean that the litigants "are left without a remedy for their mental anguish." *Simmons*, 543 Pa. at 678, 674 A.2d at 239. Respondent can bring an action "if cancer develops. It is in this action that [respondent] can assert [his] emotional distress or mental anguish claims." *Id.*

The equities here are quite different than those in *Gottshall*. If physical injuries do develop, then courts will be able to assess the true extent of the respondent's injuries -- physical and emotional -- with greater accuracy. *See id.* at 677, 238 ("The actual compensation due to the plaintiff can be more accurately assessed when the disease has manifested."). What is more, postponing recovery until respondent suffers a physical injury from the exposure has the benefit of eliminating

difficult questions about how such a federal rule would affect the accrual of injury for purposes of calculating the statute of limitations and how such a federal rule would coexist with state rules favoring a single recovery and prohibiting claim splitting.

C. "Compensating" Individuals Who Have Not Been Injured Subjects Defendants to Unlimited Liability and Jeopardizes the Ability of Courts and Insurers to Compensate Those Who Have Been Injured.

1. The Second Circuit's Ruling Creates Unprecedented and Unpredictable Liability.

The rule adopted by the Court of Appeals would allow individuals to receive compensation for the fear of future injury even though they have not yet suffered any concrete injury. This regime of automatic compensation upon exposure would bring to life "the specter of unlimited and unpredictable liability" that this Court interred in *Gottshall*. *Gottshall*, 114 S. Ct. at 2411. It has long been a bedrock principle of Anglo-American law that injury, *i.e.*, "*actual* loss or damage," is an essential element of a negligence claim. W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 30, at 165 (5th ed. 1984) (emphasis added); *see also* Restatement (Second) of Torts § 902 & cmt. a. Exposure to risk standing alone -- "[t]he threat of future harm, not yet realized" -- has never been thought sufficient to justify recovery. *Prosser and Keeton* § 30, at 165. And for good reason. Life is replete with low-level risks, including exposure to carcinogens, automobile accidents, occupational hazards, and recreational injuries. Although such exposures may increase the risk of some future injury, increased risk does not create an entitlement to automatic recovery for the discounted probability of future injury. Instead, a person exposed to a carcinogen because of another's negligence has the comfort of knowing that in the unlikely event that he develops cancer, the courts -- unencumbered by claims of those who have not suffered similar misfortune -- will ensure that he receives proper compensation. That right has always been thought sufficient,

and the law of negligence has developed accordingly. "Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered." *Id.*

This bedrock principle is reflected in the text of FELA. Although FELA was intended to expand the remedies provided by the common law of 1908 in some particulars, it does not charge employers with the duty to compensate workers for enhanced risk, any more than it makes "the employer the insurer of the safety of employees while they are on duty." *Ellis v. Union Pac. R.R. Co.*, 329 U.S. 649, 653 (1947). "FELA was intended to provide compensation for the injuries and deaths caused by the physical dangers of railroad work . . . ." *Gottshall*, 114 S. Ct. at 2410. This purpose is reflected in FELA's text, which authorizes suit by "any person *suffering injury*." § 51 (emphasis added). It does *not* permit suit by "any person *at risk of suffering injury*," or by "any person *who fears suffering injury*." In fact, Congress targeted railroad workers in enacting FELA *because* it recognized that railroad work was inherently risky. Once Congress acknowledged the risky nature of railroad work, it could have provided each employee with a lump sum payment reflecting the discounted probability of suffering an actual injury. Instead, Congress chose to have employers compensate only those employees for whom the increased risks were realized, *i.e.*, those "suffering injury." For these reasons, the recovery-upon-exposure rule adopted by the Court of Appeals is flatly inconsistent with both the common law and FELA.

What is more, the Second Circuit's ruling truly threatens to unleash unpredictable and unprecedented liability. As this Court recognized in *Gottshall*, courts have been acutely aware of the potential for runaway liability for alleged emotional damages. *See, e.g., Gottshall*, 114 S. Ct. at 2408. Wide recognition of claims for emotional distress creates the risk that such claims "'may inundate judicial resources with a flood of

relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act.'" *Id.* at 2405 (*quoting Maloney v. Conroy*, 208 Conn. 392, 397-98, 545 A.2d 1059, 1061 (1988)). These risks are particularly great with respect to fear of cancer claims. Exposure to carcinogens is simply a part of modern life. *See* Bruce N. Ames & Lois S. Gold, *Too Many Rodent Carcinogens*, 249 Science 970, 971 n.10 (1990) (observing that many common foods and beverages, including coffee, carrots and cauliflower have been found to cause cancer in laboratory experiments). In fact, the Second Circuit conceded that *asbestos* is present "in the air we breath each day." Pet. App. 20a. "Thus, all of us are potential fear of cancer plaintiffs, provided we are sufficiently aware of and worried about the possibility of developing cancer from exposure to or ingestion of a carcinogenic substance." *Potter*, 6 Cal. 4th at 991, 863 P.2d at 812.

Potential liability would prove unpredictable as well as breathtakingly vast. This Court has recognized that "[t]he incidence and severity of emotional injuries are also more difficult to predict than those of typical physical injuries . . . ." *Gottshall*, 114 S. Ct. at 2405. From any one event there are an "infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct." *Id.* at 2409. In addition, while courts are on firm ground in calculating the economic damages caused by physical injuries, they are considerably less well-equipped to estimate emotional damages, unaccompanied by physical injury, stemming from an enhanced possibility that the plaintiff may suffer a future injury.

Permitting recovery here, where negligent exposure caused perhaps no more than a one or two percent increase in the possibility that respondent will develop cancer, would produce two perverse results: (1) defendants would be subject to "infinite and unpredictable liability" far out of proportion to any risks they negligently caused, *Gottshall*, 114 S. Ct. at 2405,

and (2) some plaintiffs would recover handsome amounts even though there was never a significant possibility that they would develop *any* physical injury, much less cancer. *See Schweitzer*, 758 F.2d at 942 ("If mere exposure to asbestos were sufficient to give rise to a FELA cause of action, countless seemingly healthy . . . workers, workers who might never manifest injury, would have tort claims cognizable in federal court."); *Potter*, 6 Cal. 4th at 993; 863 P.2d at 813. This makes no sense. As the Third Circuit concluded, "[r]equiring manifest injury as a necessary element of an asbestos-related tort action" avoids problems with limitless liability and the compensation of those never injured, "and best serves the underlying purpose of tort law: the compensation of victims who have suffered." *Schweitzer*, 758 F.2d at 942.

The Court of Appeals recognized the dangers of unlimited liability but felt that the courts could limit the scope of liability by relying on the jury's determination of "whether the impact would cause fear in a reasonable person." Pet. App. 21a. The Court of Appeals elaborated: "To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." *Id.* This confidence in the jury's ability to identify reasonable claims is reminiscent of the Third Circuit's reasoning, which this Court rejected in *Gottshall*. The Third Circuit dismissed the zone of danger test as arbitrary, and expressed confidence in the ability of judges and juries to weed out frivolous claims and to provide compensation only for those emotional injuries that were reasonably foreseeable. *See Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 371, 374-75 (3d Cir. 1993); *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 98 (3d Cir. 1993). This Court found such an approach "fatally flawed in a number of respects," including that "[s]uch a fact-specific test . . . would be bound to lead to haphazard results," and that it did not account for "the prospect that allowing such suits can

lead to unpredictable and nearly limitless liability for defendants." *Gottshall*, 114 S. Ct. at 2408-09.

2. Awarding Damages for Exposure Threatens the Ability of the Judicial System and the Insurance Industry to Compensate Those Who Suffer Actual Injury.

Such unlimited liability would make underwriting almost impossible and threaten the availability of insurance. The money to pay for fear of future injury must come from somewhere, and companies would pass on a substantial portion of that cost to their customers, in the form of higher prices, and to insurance companies, in requests for indemnification. Any pass-on of costs to insurance companies would hurt both those companies *and* society as a whole. Basic underwriting principles dictate that if insurers were responsible for fear of cancer claims, premiums would increase substantially. A typical company has an expected cost of future toxic tort liabilities based on its current experience and identifiable risks. If speculative fear of cancer claims were added to that cost, insurance companies would have to increase premiums to cover the increase in their expected liability. "Realistically the burden of payment of awards for [intangible harm] must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance." *Borer v. American Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977) (*en banc*).

Even more fundamentally, permitting recovery for fear of cancer would jeopardize the very availability of insurance for toxic torts. The speculative nature of fear of disease actions -- not just the limitless liability -- would make it extremely difficult for insurance companies to predict and underwrite risks. *Cf. Gottshall*, 114 S. Ct. at 2405. "[L]iability for fear of contracting disease and for medical monitoring expenses [is] . . . sufficiently open-ended to contribute to the uncertainty now troubling the insurance market." Kenneth S. Abraham,

Environmental Liability and the Limits of Insurance, 88 Colum. L. Rev. 942, 973 (1988). As the California Supreme Court recently concluded, "[s]hould [fear of cancer] liability continue to grow, and thereby lead to a substantial increase in toxic tort litigation, such liability insurance will become even more scarce and prohibitively expensive." *Potter*, 6 Cal. 4th at 991, 863 P.2d at 812 (*quoting* Willmore, *In Fear of Cancerphobia*, 3 Toxics L. Rptr. 559, 563 (1988) (second brackets in original)). Society at large, and injured tort victims in particular, would be far better served by a tort system that assessed liability in a more predictable manner. "[L]imiting the negligent actor's exposure [to suits by those who are physically injured] makes it possible to protect potential victims and the defendant through insurance or other risk-spreading mechanisms whose cost is more closely related to the risk . . ." *Thing v. La Chusa*, 771 P.2d 814, 826 (Cal. 1989) (*en banc*).

Allowing recovery for the emotional distress engendered by an increased risk of cancer would make the provision of insurance virtually impossible. Fundamental to any notion of providing insurance is that risks will be pooled and payments will be made to the unfortunate few who actually suffer the injury. *See* Keeton & Widiss, *Insurance Law* § 1.3, at 9 (1988). If exposure and the resulting increased risk of injury are sufficient to permit a claim, so that contingencies rather than events or injuries are compensated, then insurance cannot perform its function. If all increased risks had to be compensated immediately, it would become impossible to pool the risks. In effect, by allowing recovery upon a showing of increased risk, the courts are approximating the function of insurers, but are doing so with incalculably higher transaction costs, and in the case of FELA, without any statutory authorization.

Negligence law assures those who are subjected to an unreasonable risk of harm that *if* they sustain an injury, they will receive compensation. Insurance companies play a similar

role: They protect people who are at risk of suffering an injury by promising to compensate those who actually incur one. Courts and insurance companies do not, and can not, "compensate" all those who fear that they *might* suffer an injury in the future, irrespective of whether they *actually* do so. Our nation can ill-afford such coverage.

Finally, "compensating" those who have not been injured is an absurd misallocation of limited judicial and financial resources.

> It does not lie within the power of any judicial system to remedy all human wrongs. The obvious limitations upon the time of the courts, the difficulty in many cases of ascertaining the real facts or of providing any effective remedy, have meant that *there must be some selection of those more serious injuries which have the prior claim to redress* and are dealt with more easily.

Prosser and Keeton § 4, at 23 (emphasis added). Asbestos litigation long ago reached "crisis proportions," and it shows no signs of abating. *See Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985); *cf. Ahearn v. Fibreboard Corp. (In re Asbestos Litig.)*, 90 F.3d 963, 982, 984 (5th Cir. 1996) (finding that a "healthy company" was a limited fund for purposes of class certification because its asbestos liabilities would bankrupt it within five to nine years). Permitting suit by those who fear that they might be injured at an indefinite point in the distant future would divert resources -- both adjudicative and financial -- away from those who are actually injured and in need of compensation. That diversion is fundamentally at odds with a rational compensation system.

D. Respondent's Claim Fails for the Additional Reason That He Has Not Demonstrated Any Physical Manifestations of His Alleged Emotional Injuries.

As this Court noted in *Gottshall*, "[t]he common law consistently has sought to place limits on . . . potential liability [for negligently-inflicted emotional distress] by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover." 114 S. Ct. at 2408. The limits on who could sue explored in *Gottshall* were one, but far from the only, means of restricting liability for alleged emotional distress. Plaintiffs who fell squarely within the zone of danger still had to satisfy other prerequisites before they could bring a valid cause of action, including the requirement that their emotional injuries manifest themselves physically. *See, e.g.*, *Gottshall*, 114 S. Ct. at 2407 n.11. Even if (contrary to fact) respondent could satisfy *Gottshall*'s zone of danger test, his claim would founder on this independent requirement of the common law, which this Court should incorporate into FELA.

Historically, jurisdictions employing the zone of danger test further required a physical manifestation of the resulting emotional distress. Many jurisdictions continue to require such a physical manifestation. As this Court summarized, "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." *Gottshall*, 114 S. Ct. at 2407 n.11; *see, e.g., K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995); *Towns v. Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978) (*en banc*); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 410, 234 A.2d 656, 659-60 (1967); *see also* Restatement (Second) of Torts § 436A cmt. b ("emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern

itself with trifles."). The physical-manifestation requirement has long been recognized as an important protection against trivial or feigned claims. "Because emotional distress is highly subjective, often transient, and easily alleged, our tort law, in addition to a 'zone of danger' requirement, also requires physical manifestation of the distress as proof of the genuineness and gravity of the emotional suffering." *Garvis v. Employers Mut. Casualty Co.*, 497 N.W.2d 254, 257 n.3 (Minn. 1993). For this reason, some jurisdictions that have rejected the zone of danger test in favor of a broader "foreseeability" standard nonetheless continue to demand a physical manifestation. *See, e.g., Thorpe v. State*, 133 N.H. 299, 302, 575 A.2d 351, 353 (1990); *cf. Gottshall*, 114 S. Ct. at 2414-15, 2417 (Ginsburg, J., dissenting) (finding it "notable" that plaintiffs satisfied "the 'physical manifestation' test endorsed by the Restatement of Torts"). Without the physical manifestation requirement to assist courts in identifying meritorious claims for emotional distress, the game is not worth the candle.

> Although cases may arise in which the emotional distress absent physical harm may not be temporary or slight . . . , [w]e are unwilling . . . to impose upon the judicial system and potential defendants the burden of dealing with claims of damages for emotional distress that are trivial, evanescent, temporary, feigned, or imagined, in order to ensure that occasional claims of a more serious nature receive judicial resolution.

Amendola v. Kansas City So. Ry. Co., 699 F. Supp. 1401, 1410 (W.D. Mo. 1988) (*quoting Payton v. Abbott Labs.*, 437 N.E.2d 171, 180 (Mass. 1982)).

In light of its screening function, the physical-manifestation requirement is not merely a procedural nicety that is easily satisfied. Instead, a plaintiff must show significant, long-lasting illness. *See* Restatement (Second) of Torts § 436A cmt. c; *cf. Atchison, Topeka & Santa Fe Ry. Co.*

v. Buell, 480 U.S. 557, 570 n.18 (1987) ("One leading commentary states that '[i]n the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character.'") (*quoting Prosser & Keeton*, at 64).[7] Respondent has not come close to demonstrating serious physical symptoms. Rather, he alleges only that he feels "an appropriate degree of anger and concern" about his exposure. *See* Br. in Opp. 19. This will not suffice.

II. THIS COURT SHOULD NOT RECOGNIZE AN ACTION FOR MEDICAL MONITORING UNDER FELA.

The Court of Appeals further expanded potential liability by indicating that "medical monitoring costs are a reasonable basis for an award of damages in this case," even without any physical injury. Pet. App. 25a. The effect of this ruling was to recognize an independent cause of action for medical monitoring. But there is no support in the common law or FELA for such an action. The Second Circuit observed that "[i]t is hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred *as a result of an injury*." Pet. App. 25a-26a (*quoting* Charles T. McCormick, *Handbook on the Law of Damages* § 90 (1935)) (emphasis added). That is true. But it hardly authorizes a court to award

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[7] Even jurisdictions that reject the "physical manifestation" test generally require a showing of injury sufficiently severe to be medically significant. *See, e.g., Aurora v. Burlington N. R.R.*, 31 F.3d 724, 725-26 (8th Cir. 1994) (noting that to permit a recovery, "a plaintiff's emotional distress must be 'so severe that no reasonable person could [be] expected to endure it. Furthermore, the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant.'") (*quoting Parish v. Omaha Public Power Dist.*, 242 Neb. 731, 496 N.W.2d 914, 915 (1993) (brackets in original)); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983); *see also Gottshall*, 114 S. Ct. at 2418 (Ginsburg, J., dissenting) (suggesting a requirement of "objective medical proof" of emotional injury). Respondent's alleged emotional injuries fail to meet even this relatively undemanding test.

such damages *without identifying any underlying injury*. By treating the need for medical monitoring as an injury in itself -- which is to say, a cause of action in itself -- the court vastly expanded FELA liability and sought to enact, by judicial fiat, a major reform in preventive health care insurance.

As the Second Circuit's own authority indicates, courts are not free to award damages in the absence of an actionable injury. *Accord* Restatement (Second) of Torts § 902 & cmt. a. Here, there simply is no injury. First, it is undisputed that respondent has not suffered a physical injury. Moreover, for all the reasons discussed above, he has not suffered a compensable emotional injury. But even if (contrary to fact) respondent had suffered an actionable emotional injury, the Court of Appeals' indication that medical monitoring should be available still would not make sense. The medical monitoring suggested by the Court of Appeals has nothing to do with respondent's purported emotional injuries. Respondent did not seek, and the Court of Appeals did not authorize, monitoring by psychiatrists to ensure that respondent did not develop further emotional distress from his fear of cancer. To the contrary, the Court of Appeals suggested that "Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos-related disease he develops." Pet. App. 28a. Presumably, what the Court of Appeals was really trying to remedy was respondent's exposure to asbestos. But FELA provides absolutely no basis for awarding medical monitoring to remedy an exposure (or an impact). FELA allows only those individuals "suffering injury" to bring a cause of action and recover damages.

Such a radical expansion of tort liability is especially inappropriate under FELA. First and foremost, it is wholly lacking in historical support. *See Cf. Susan L. Martin & Jonathan D. Martin, Tort Actions for Medical Monitoring: Warranted or Wasteful?* 20 Colum. J. Envtl. L. 121, 122-23 (1995). Claims for medical monitoring damages in the absence of a present injury were simply unheard of at the time of

FELA's enactment in 1908. Second, as this Court has made clear on more than one occasion, "FELA is not an insurance statute." *Gottshall*, 114 S. Ct. at 2409; *see also Ellis*, 329 U.S. at 653. In *Gottshall*, this Court rejected the foreseeability test proposed by the Third Circuit, in part because "the Third Circuit's ruling would tend to make railroads the insurers of the emotional well-being and mental health of their employees." *Gottshall*, 114 S. Ct. at 2409. But if FELA does not create an insurance policy for employees, it certainly cannot be interpreted to furnish them with an HMO. In sum, the Court of Appeals' decision to award medical monitoring damages to remedy exposure is fundamentally at odds with the modified common law system of recovery for negligently-caused injuries embodied in FELA.[8]

Moreover, in recognizing respondent's claim for medical monitoring, the Court of Appeals ignored not only the absence of any physical injury, but also the lack of any evidence of a significant increase in respondent's need for medical monitoring. The Court of Appeals emphasized that, in light of respondent's exposure to asbestos, he should receive regular medical check-ups to ensure early detection of cancer. While that is sound advice, it is applicable to almost everyone, whether or not they have been exposed to asbestos. In fact, the American Cancer Society recommends that *all* Americans over the age of 40 receive annual examinations for cancer. *See*

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[8] All of the policy objections to the creation of a fear of cancer tort apply with full force to the creation of an independent cause of action for medical monitoring. The unpredictable nature of liability under this novel cause of action would expand liability and create uncertainty that would make underwriting risks very difficult. *See* Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 Colum. L. Rev. 942, 973 (1988). What is more, "allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants." *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D.W.V. 1990), *aff'd by* 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

American Cancer Society, *Summary of Current Guidelines for the Cancer-Related Checkup: Recommendations* (1987).

In addition, respondent's claim would fail even in those jurisdictions that have recognized claims for medical monitoring. Some courts that allow medical monitoring damages still require a showing of a substantial increase in the likelihood of contracting the disease. *See, e.g., Joy Mfg. Co.*, 755 F. Supp. at 1372. Such evidence is absent here. And even the courts that have been the most aggressive in awarding medical monitoring damages require a "showing that the need for monitoring is a reasonably certain consequence of the exposure . . . ." *Potter*, 6 Cal. 4th at 1006, 863 P.2d at 823. There is simply no basis for the courts to shift the costs of medical monitoring, that respondent should have borne in any event, onto respondent's employer.

Finally, even if such employer-financed medical monitoring is sound policy, such a policy innovation should come from Congress or the States. It should not come from the federal courts' interpretation of a statute enacted in 1908 that says not a word about medical monitoring. The wisdom of employer-financed health care is a hot topic for potential legislative reform across the nation. Congress did not anticipate that trend by ninety years with respect to the railroad industry. Congress and the States are free to impose the costs of medical monitoring on all employers on some equitable basis. But for the courts to impose those costs on a single company in a single industry solely because it caused a slight increase in the possibility that a plaintiff will suffer an injury in the distant future -- even though it has not caused a present tortious injury or even a probability of a future tortious injury -- is nothing short of judicial health care reform.

CONCLUSION

For the reasons discussed above, as well as those set forth in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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December 16, 1996

(18)

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

No. 96-320

IN THE

Supreme Court of the United States

October Term, 1996

METRO-NORTH COMMUTER RAILROAD,
Petitioner,

vs.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* DEFENSE RESEARCH INSTITUTE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETIONER

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INTEREST OF THE AMICI CURIAE

The Defense Research Institute ("DRI") is an organization with members throughout the United States numbering in excess of 20,000. It seeks to advance the cause of the civil justice system in America by insuring that the concerns of the defense bar and potential defendants are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress on select legislation impacting the civil justice system. The Defense Research Institute provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.

The National Association of Manufacturers ("the NAM) is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The Defense Research Institute and National Association of Manufacturers are interested in the outcome of this case because of the potentially large number of claims it will affect. If this Court allows the lower court's decision to stand, the end result will be that future litigants will rely upon the Second Circuit's alarming decision to try to expand tort liability in other than just FELA cases, and the door to subjective claims of emotional distress will be thrown wide open.[1]

Written consent to the filing of this brief of Amici Curiae was granted by all parties.

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[1] *According to the Connecticut Law Tribune, the Second Circuit's ruling that "workers could sue the railroad for asbestos exposure—even though they may be years from falling ill" will have a tremendous effect on American tort law. Steven Fromm, The Snowmen of Grand Central, Conn. Law Tribune, Apr. 15, 1996, at 1. The article states, "Attorney's [sic] specializing in asbestos and product liability law in Connecticut and across the country assert that the ruling is a landmark decision that may open the door for asbestos exposure cases—and other product liability cases—throughout the country." Id. The article goes on to report that thousands of cases (totaling 35,000 to 40,000) involving members of the Merchant Marine who charge that they were exposed to asbestos during their service over the years have been consolidated in the U.S. District Court in Philadelphia. Id.*

SUMMARY OF ARGUMENT

The Petitioner seeks reversal of an opinion of the Second Circuit holding that a plaintiff who was exposed to asbestos but had no physical injury was entitled to damages for emotional distress and medical monitoring on the theory he was in the "zone of danger." Petitioner raises four questions for consideration. The provisions of the Federal Employers Liability Act and recovery under that Act are set forth persuasively in the Petitioner's Brief and will not be addressed here. Rather, this Brief will focus on the common law requirements of the "zone of danger" test for a purely emotional injury. It will also address the need for this Court to recognize the common law standards established to test the validity and extent of emotional injury claims: (a) physical manifestation; (b) seriousness; and (c) medical or scientific evidence.

While the zone of danger test adopted by this Court in *Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396 (1994) addresses who may make a claim, the Second Circuit opinion demonstrates that the Court should go further and address the minimum requirements for the type of claims that are permitted.

I. THE SECOND CIRCUIT INCORRECTLY EXPANDED THE "ZONE OF DANGER" TEST DEFINED BY THIS COURT IN GOTTSHALL

After reviewing several theories, this *Court in Consolidated Rail Corporation v. Gottshall*, 114 S.Ct. 2396 (1994) adopted the "zone of danger" test "as delimiting the proper scope of an employer's duty under FELA to avoid subjecting its employees to negligently inflicted emotional injury." Id. at 2410. This Court concluded that the "zone of danger" test best reconciles common law considerations and FELA jurisprudence. Id. Although at the time FELA was enacted, most of the major industrial states applied the physical impact test, id. at 2406, it was noted that the "zone of danger" test was somewhat less restrictive and therefore more consistent with the broad remedial goals of the Act. Id. at 2410. However liberal the "zone of danger" test may be interpreted, it is submitted that the test's application must still be restricted by the common law policies underlying its necessity and that the "zone of danger" test is itself a restriction upon the recovery for emotional injury. Mere exposure to a potentially harmful substance

does not give rise to a cause of action for negligent infliction of emotional distress.[2]

It is well established that FELA recognizes a right to recover for negligent infliction of emotional distress, but because of the threat of a flood of imagined or falsified claims and the imposition of liability for highly remote consequences of a negligent act, courts originally placed significant limitations, through tests and rules, on the right of recovery . Id. at 2405 (quoting *Maloney v. Conroy*, 208 Conn. 392, 397-398, 545 A.2d 1059, 1061 (1988)). Unfortunately, the Second Circuit lost sight of the "limiting" aspect of these tests and rules.

Limitations, like the "zone of danger" test, were created to help define one's duty under the law, but the Second Circuit's opinion allowing recovery has so muddied the interpretational waters of the limitations as to render the average individual helpless in a sea of potential liability. As a result, some courts, like the Second Circuit in this case, have inappropriately established liability under the "zone of danger" test in situations to which the common law did not intend the test to apply.

A. THE "ZONE OF DANGER" TEST WAS INTENDED TO APPLY TO SITUATIONS INVOLVING IMMEDIATE RISK OF PHYSICAL HARM TO A REASONABLE PERSON WHO CONTEMPORANEOUSLY FEARED FOR HIS OR HER SAFETY.

As this Court stated in *Gottshall*, the "zone of danger" test was founded on the "realization that a near miss may be as frightening as a direct hit[.]'" *Gottshall*, 114 S.Ct. at 2406 (quoting Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment on the Nature of Arbitrary Rules*, 34 U.Fla.L.Rev. 447, 488 (1982)). The test broadened the scope of duty beyond that required by the "physical impact" test to include not only those who sustain a physical impact as a result of the negligent conduct but also those who were placed in immediate risk of physical harm by that conduct. That test, however, does not allow recovery for mere exposure to a substance that may be harmful.

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[2] *Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3rd Cir.) cert. denied, 474 U.S. 864 (1985); Ball v. Joy Technologies, Inc., 958 F.2d 36, 38 (4th Cir. 1991) ("The mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for this emotional distress) cert. denied, 502 U.S. 1033 (1992); Bubash v. Philadelphia Elec. Co., 717 F.Supp. 297, 300 (M.D.Pa. 1989); Friedman v. F. E. Myers Co., 706 F.Supp. 376, 381 (E.D.Pa. 1989) ("[i]n the absence of any evidence beyond mere exposure, the court finds that (plaintiffs) claims for [negligent infliction of] emotional distress cannot stand").*

1. THE "ZONE OF DANGER" IS CIRCUMSCRIBED BY PHYSICAL AND TEMPORAL PROXIMITIES.

The "zone of danger" test delimits the duty to avoid infliction of emotional distress by circumscribing both the physical area within which an injured party must be located and the temporal area within which the injured party must experience the shock from which the emotional injury flows. These areas establish foreseeability of victim and harm to aid in the recognition of duty and liability.

The "zone" within which the plaintiff must be located is defined by physical and temporal proximity. The injured party must be in a physical area where the average person could foresee that his or her negligence places another in danger of immediate physical harm. Thus, the average individual can assess the scope of his or her duty and to whom it is owed.

The "zone" is also bounded by the time during which a party experiences the cause of his or her emotional distress. The plaintiff must contemporaneously experience a reasonable apprehension of the physical impact from which a foreseeable emotional injury arises. *Camper v. Minor,* 915 S.W.2d 437, 442 (Tenn. 1996)(citations omitted); *Gottshall,* 114 S.Ct. at 2411 ("Railroad employees thus will be able to recover for injuries-physical and emotional-caused by the negligent conduct of their employers that threatens them imminently with physical impact." (emphasis added)). "Subsequent brooding" over the exposure to a risk of physical harm is insufficient.[3] RESTATEMENT (SECOND) OF TORTS 436 cmt. c (1965). The next obvious question to address is whether the plaintiff actually experienced a "reasonable apprehension."

2. THE EMOTIONAL INJURY MUST STEM FROM A "SHOCK" OR "FRIGHT."

Like the physical and temporal limits of the "zone," the reasonableness of the apprehension must be interpreted in light of the policies underlying the adoption of the "zone of danger" test. When jurisdictions first adopted the "zone of danger" test to replace the stringent "physical impact" test, they did so based on the general observation that "fright or shock is a link in the chain of proximate causation as efficient as physical impact from which like results flow." *Pankopf v. Hinkley*, 141 Wis. 146, 123 N.W. 625,

[3] *The Restatement recognizes that some situations exist where negligence creates a long continued peril. Mental injury resulting from such situations must be caused by the cumulative effects of the anxiety over the constant subjection to a peril. Restatement (Second) of Torts 436 cmt. c (1965).*

627 (1909)(emphasis added).[4] According to these jurisdictions, "fright" and "shock" were the type of "reasonable apprehensions" which cause actionable emotional distress. These jurisdictions did not arbitrarily choose the terms "fright" and "shock" as opposed to "fear" or "apprehension."

Fear and apprehension are unpleasant, but commonplace experiences.[5] Fright and shock, on the other hand, are occurrences "as efficient" as an actionable physical impact; they are usually more sudden and finite than fear and apprehension, and thus, less likely to impose unlimited liability.

The requirement of an immediate "fright" or a "shock" is supported by rulings of courts employing the "zone of danger" test today, even those extreme examples cited by the Second Circuit. Those cases, while ignoring the "near miss" requirement, at least recognized the "fright" or "shock" requirement. For example, in Marchica v. Long Island Railroad Co., 31 F.3d 1197 (2nd Cir. 1994), cert. denied, 115 S.Ct. 727 (1995), which the Second Circuit cited as being inapposite to its ruling in *Buckley v. Metro-North Commuter R.R.*, the plaintiff was stabbed by a hypodermic needle found in an area which he knew was frequented by prostitutes, drug users, and illegal aliens. *Marchica,* 31 F.3d at 1200. Immediately after he was stabbed, plaintiff went to the nearest hospital and received hepatitis and tetanus shots. Id. He also underwent an HIV test and was told not to have relations with his wife. Id. a 1200-1201.

[4] *See, e.g., the cases cited in Gottshall, 114 S.Ct. at 2406, n.8, as having adopted the "zone of danger" test when FELA was enacted: Simone v. Rhode Island, 28 R.I. 186, 66 A. 202, 208 (1907)("It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid.")(emphasis added); Kimberly v. Howland, 143 N.C. 398, 55 S.E. 778, 780 (1906) (a "negligent tort so terribly frightened a person as to cause death or leave him through life a suffering and helpless wreck...")(emphasis added); Gulf, C. & S.F. R. Co. v. Hayler, 93 Tex. 239, 54 S.W. 944, 945 (1900)("Where an injury "results from a fright or other mental shock... the injured party is entitled to recover...")(emphasis added); Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905, 909 (1898)("It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system...")(quoting Sloane v. Ry. Co., 44 Pac. 322 (Cal.))(emphasis added); Stewart v. Arkansas Southern R. Co., 112 La. 764, 36 So. 676, 677 (1904)(rejecting jurisdictions which disallow recovery for fright without an initial injury); Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068, 1069 (1902)("It is within the common observation of all that fright may, and usually does, affect the nervous system,... and that an entirely sound body is never found with a diseased nervous organization.")(emphasis added).*

[5] *"Fear," as defined by Merriam Webster's Collegiate Dictionary 425 (10th ed. 1995), is "an unpleasant often strong emotion caused by anticipation or awareness of danger." Webster's goes on to compare "fear" to "fright" by stating, "FRIGHT implies the shock of sudden, startling fear. . ." (emphasis in original).*

"Apprehension" is "suspicion or fear especially of future evil." Webster's Collegiate Dictionary 57 (10th ed. 1995).

In Hagerty v. L.&L. Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986), *modified* 797 F.2d 256 (1986), a tanker man was soaked with chemicals whose characteristics the tanker man had previously studied, and he knew them to be carcinogenic. Hagerty, 788 F.2d at 318-19. After *Hagerty* had "watched Benzine absorb into his finger," *id.* at 319, he "doused his clothes and shoes with water immediately and then removed the clothes and took a shower." Id. at 317.[6]

Each of these plaintiffs immediately recognized the potential harm when they were exposed to it. They may have experienced a general fear of possibly being stabbed by a hypodermic needle or possibly being soaked with carcinogenic chemicals, but they experienced a shock or fright when that fear was realized and they actually were stabbed with a needle and soaked with carcinogenic chemicals. Shock and fright compelled them to take precautions to prevent further harm and to seek medical treatment. Shock and fright were Marchica's and Hagerty's "reasonable apprehension" which was discernible through not only their knowledge of their particular predicament, but also their responsive actions.

B. EXPOSURE TO ASBESTOS DOES NOT PLACE AN INDIVIDUAL WITHIN A FORESEEABLE "ZONE OF DANGER."

Mere exposure to a substance, though potentially harmful, is not an immediate threat of physical harm. Because all air contains some asbestos fibers, (and practically everyone is exposed to some potentially harmful substance on almost a daily basis) physical injury from asbestos and other substances may develop from repeated exposure to high concentrations and allegedly takes years to manifest itself. Therefore, asbestos exposure never poses immediate physical harm or a "near miss."

The physical and temporal limits necessary to establish a true threat of physical injury from substance exposure are broader than any "zone of danger" originally envisioned by the common law. The "personal aura" of danger would create unlimited liability for potential defendants.

Here, the plaintiff alleges that the exposure to asbestos at his workplace created a "zone of danger." However, the plaintiff has never alleged that, while within the "zone" he experienced shock, fright, or any other reasonable apprehension of the inhalation of asbestos fibers. Indeed, after learning of the identity and allegedly potentially harmful nature of the white,

[6] *The Second Circuit also cites Lavelle v. Owens-Corning Fiberglas Corp., 30 Ohio Misc.2d 11, 507 N.E.2d 476 (Com.Pl. 1987) as "inapposite" to its ruling. Buckley, 79 F.3d at 1345. However, unlike the plaintiffs in Hagerty and Marchica, and in this case, the plaintiff in Lavelle had a permanent physical injury - he was afflicted with asbestosis.*

powdery insulation material, the plaintiff continued to remove it, even though he could have transferred to another job. The plaintiff was not shocked or frightened by his alleged exposure to harm while in the "zone of danger." Presumably, a reasonable person would avoid a known "zone of danger." The plaintiff, on the other hand, returned to the alleged "zone." His alleged emotional distress did not result from a "reasonable apprehension" of immediate physical harm within a "zone of danger."

The plaintiff's alleged emotional distress arose after his exposure, after his learning of the alleged physical harm asbestos might cause, and after he voluntarily re-exposed himself to asbestos. His alleged emotional distress results not from shock or fright contemporaneous to his exposure, but "subsequent brooding" over the admitted negligence of the defendants. His alleged emotional injury is outside the physical and temporal limits of the foreseeable "zone of danger," and therefore, the test cannot impose liability against the defendants.

II. THIS COURT SHOULD RECOGNIZE COMMON LAW MINIMUM STANDARDS FOR SCRUTINIZING EMOTIONAL INJURY CLAIMS

The Second Circuit, in its application of the "zone of danger" test adopted by this Court in *Gottshall,* failed to impose any of the common law standards with which to test the validity of emotional injury claims. This Court should not allow the Second Circuit's decision to stand and should adhere to common law minimum standards for scrutinizing negligent infliction of emotional distress claims.

When this Court in *Gottshall,* adopted the "zone of danger" test, it noted several concerns stemming from emotional distress claims potentially creating "infinite liability" to an "infinite number of persons." *Gottshall,* 114 S.Ct. at 2408-2409 and 2411. Because it is more difficult to predict the existence and degree of mental injury, any number of people may suffer emotional distress which "may occur far removed in time and space from the negligent conduct..." *Id.* at 2405. *Id.* In short, the *Gottshall* Court's concerns were based on the difficulty in determining *who* suffers *compensable* mental suffering.

Based on these same concerns, "[t]he common law consistently has sought to place limits on this potential liability by restricting the class of plaintiffs *who* may recover and the *types* of harm for which plaintiffs may

recover.'"[7] *Id.* at 2405 (emphasis added). Through its adoption of the "zone of danger" test, *Gottshall* followed the common law tradition by placing limitations on those who may recover,[7] but the opinion of the Second Circuit in this case demonstrates that this Court should go further.

By narrowly defining who can bring a mental injury claim, the "zone of danger" test resolves the common law's and *Gottshall's* concerns over such claims creating an "unlimited number" of potential plaintiffs, but because the Court failed to define which mental injuries are compensable, the "zone of danger" test was interpreted by the Second Circuit to allow a plaintiff to recover for any injury, no matter how trivial. *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337 (2nd Cir. 1996) (holding that a plaintiff may recover for pure emotional injuries with no accompanying physical injury or objective proof of the mental injury). The "zone of danger" test dams the "veritable flood of litigation," but its failure to establish a standard for compensable mental distress creates substantial "cracks."

These "cracks" of potentially "unlimited liability" are caused by the difficulty in determining the existence and the extent of emotional distress. An individual may genuinely, but wrongly, believe that he or she suffers mental injury as a result of an act of negligence. *Payton v. Abbott Labs.*, 386 Mass. 540, 546, 437 N.E.2d 171, 175 (1981). Recognizing the ability of the human mind to play tricks upon itself, as easily as people are able to deceive one another, courts "continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered mental distress." *Id.* It is not, and cannot be, the law that one is liable in damages to anyone whose mental tranquility might foreseeably be disturbed by a negligent act. This Court should continue to adhere to the common law and its traditional indicia of harm.

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7 Although courts have begun to recognize claims for negligent infliction of emotional distress, "concerns over the possibility of a flood of litigation and the need to limit liability in proportion to the defendant's culpability led courts to develop threshold tests to determine the validity of claims for emotional distress." J. Mark Appleberry, Negligent Infliction of Emotional Distress, 21 Am.J.L.&Med. 301 (1995) (examining the current state of the law governing negligent infliction of emotional distress claims).

The common law has undergone significant upheaval in recent years with respect to claims for negligent infliction of emotional distress.[8] Many courts have abandoned the traditional tests of requiring "physical impact" [9] or that the plaintiff be in the "zone of danger." Some of the more liberal tests are known by a variety of names, such as "foreseeability"[10] and "general negligence."[11] Many different names and methods of limiting these claims exist, but the purpose remains the same.[12] However the test is formulated in a specific jurisdiction, the fundamental, overriding concern among the courts is that there must be some minimum standard for recovery of purely emotional distress claims where there is no physical injury. *See, e.g., R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360 (Fla. 1995); *Hammond v. Central Lane Communications Ctr.*, 312 Ore. 17, 816 P. 2d 593 (1991); *Ob-Gyn Assc's of Albany v. Littleton*, 259 Ga. 663, 386 S.E. 2d 146 (1989); *Garrison v. Medical Ctr. of Delaware*, 581 A. 2d 288 (Del. 1988); *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980).

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8 Legal scholars addressing the issue state, "the case law in the field [of negligent infliction of emotional distress] is in an almost unparalleled state of confusion." Leslie Benton Sandor & Carol Berry, Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment, 37 Ariz. L. Rev. 1247, 1249 (1995).

9 According to John L. Ropiequet, "Due to judicial stretching of the physical impact or injury requirement, its practical effect in many jurisdictions is virtually meaningless." John L. Ropiequet, Emotional Distress Claims in Medical Malpractice Cases, For the Defense, April 1990 13, 13.

10 The "foreseeability" approach or "relative bystander" test was first utilized by the California Supreme Court in Dillon v. Legg, 441 P.2d 912 (1968). After the Dillon ruling, the California courts began to experiment with the ruling and to expand liability. Finally, the California Supreme Court "put an abrupt halt to expansive readings of the Dillon rule in Thing v. La Chusa, 48 Cal. 3d 644, 257 Cal. Rptr. 865 (1989), ending 20 years of experiments and disagreement in the lower courts by returning to a literal reading of the elements set forth in Dillon." John L. Ropiequet, Emotional Distress Claims in Medical Malpractice Cases, For the Defense, April 1990 13, 18. The Thing Court "drew what it admitted were arbitrary lines to limit liability and establish firm rules by changing Dillon's guidelines' into positive rules of law." Id. The significance of this reversion back towards a more conservative approach is that California retreated away from a liberal, expansive view of emotional tort liability. The California courts' search for concrete guidelines demonstrates the need for substantial certainty in the law of negligent infliction of emotional distress.

11 The most recent jurisdiction to address this issue is the State of Tennessee. Upon surveying the law and addressing the significant policy concerns, the Tennessee Supreme Court recently adopted a "general negligence" approach towards these types of claims. Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996).

12 Courts have addressed the substantial public policy concerns stemming from these types of cases. For example, in Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir. 1991), the Fourth Circuit affirmed the district court's grant of the defendant's motion for summary judgment, finding that the "plaintiffs had not sustained any

Because the more liberal tests create substantial "cracks" in the dam of the "veritable flood of litigation," most jurisdictions impose additional standards with respect to the types of emotional injury which may be compensated. Many that follow the "zone of danger" or "relative bystander" tests also require that a plaintiff demonstrate "physical manifestation" of an alleged emotional injury, that is, a physical injury or effect that is the direct result of an emotional injury, in order to recover. *Gottshall,* 114 S.Ct. at 2407, n. 11 (citing *Garvis v. Employers Mut. Casualty Co.,* 497 N.W.2d 254 (Minn. 1993)).

Other courts, even the courts that have expanded to the broadest and most undefinable "general negligence" approach, have recognized the requirements that the emotional injury be "serious" or "severe." *Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996); *Burgess v. Superior Court,* 2 Cal. 4th 1064, 831 P.2d at 1197, 1200 (1992); *Shultz v. Barber Glass Co.,* 4th Ohio St.3d 131, 447 N.E.2d at 109, 113 (1983) ("we hold that a cause of action may be stated for the negligent infliction of serious emotional disturbance without a contemporaneous injury"); *St. Elizabeth Hosp. V. Garrard,* 730 S.W.2d 649, 653 (Tex. 1987) (stating that "freedom from severe emotional distress is an interest which the law should serve to protect.") The reason for these standards for compensable mental injury "is to guard against the litigation of trivial or fraudulent claims." *Burgess,* 831 P.2d at 1200, n. 6.

The Second Circuit's decision represents a relaxation of the traditional standards of tort liability and an expansion of liability for negligent infliction of emotional distress.[13] The Second Circuit analysis uses no minimum standards to test the genuineness of alleged negligent infliction of emotional distress claims. It is submitted that the Second Circuit's decision, if allowed to stand, will be relied upon by untold numbers of future litigants in FELA, Jones Act, products liability, toxic tort and other common law cases for its expansive holding and the dangerous precedent it sets. The Second Circuit's decision demonstrates that this Court should hold that the law provides minimum standards for testing the genuineness of such claims and recognize the common law requirements.[14]

A. THERE SHOULD BE A REQUIREMENT OF SOME PHYSICAL MANIFESTATION OF THE DISTRESS

The interests of justice require adoption of a bright-line rule establishing the standard for compensating mental injuries. The "genuineness" of the claim can best be addressed by the physical manifestation requirement.[15] Emotional distress without physical consequence is unlikely to be serious and, more probably, is "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants." RESTATEMENT (SECOND) OF TORTS 436A cmt.b (1965). Moreover, emotional distress is easily imagined and feigned. The modern medical community has long accepted the correlation

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physical injury from their exposure to toxic chemicals and having suffered no physical injury, the common law of West Virginia and Virginia would not allow them to recover damages for emotional distress or the costs of medical surveillance." Id. At 37. The district court emphasized the policy considerations behind its decision:

> *There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the cost of future or medical monitoring in a civil action could potentially devastate the court system as well as defendants. Again, this is not to say that defendants who have caused such exposure should not pay the price. Certainly, theoretically both justice and common sense dictate that they should, however, practically there must be a realization that such defendants' pockets or bank accounts do not contain infinite resources. Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiffs being remediless. Thus, to prevent one injustice from arising from another, the finite resources available must be spent both cautiously and wisely. This basic dilemma has plagued tort law since its inception. Because of it, lines, sometimes arbitrary, have been drawn, and will continue to be drawn, to limit and delineate the whens and ifs individuals will be allowed recovery for a wrong committed against them.*
>
> *Ball v. Joy Technologies, 755 F. Supp. 1344, 1372 (S.D.W.Va. 1990).*

[13] *According to the Restatement, "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." Restatement (Second) Torts 436A (1965) (emphasis added).*

[14] *For example, James F. Early, a partner in New Haven's Early, Ludwick & Sweeney which handles similar cases, recently stated, "what is significant about this case is that you may be able to bring a lawsuit at an earlier date, rather than waiting until you have some objective evidence in the form of an x-ray, a breathing test, before the actual physical manifestation." Steven Fromm, supra, note 1. The potential for future litigants to be able to bring a lawsuit without possessing any objective evidence of the claim is a frightening proposition for our judicial system.*

[15] *The courts in many jurisdictions require emotional distress to be physically manifested in order to be compensable. See Towns v. Anderson, 195 Colo. 517 (1978) (en banc) (physical manifestations or mental illness); Barnhill v. Davis, 300 N.W.2d 104 (Iowa 1981) (bystander case); Vicnire v. Ford Motor Co., 401 A.2d 148, 155 (Me. 1979) (illness or bodily harm "substantial and manifested by objective symptomology"); Vance v. Vance, 388 Md. 490, 500 (1979) ("capable of objective determination"); Corso v. Merrill, 119 N.H. 647, 653 (1979) (bystander case) (physical symptoms . . . susceptible to some form of objective medical determination and proved through medical witnesses").*

between mental illness and physical manifestations.[16] RESTATEMENT (SECOND) OF TORTS 436A cmt.b (1965). Finally, negligence is not so great a fault as to require the imposition of liability for purely mental injury. RESTATEMENT (SECOND) OF TORTS 436A cmt.b (1965).

Undoubtedly, there will be cases where serious mental injury is not accompanied by physical harm, but these are in the minority. *Payton v. Abbott Labs.*, 386 Mass. 540, 555, 437 N.E.2d 171, 180 (1981). Allowing recovery simply because these cases exist is not rational or justifiable. Id. at 556, 180. Emotional distress without physical manifestation is not a reasonably foreseeable consequence of mere negligence. *Id.* Courts must refrain from burdening the judicial system and potential defendants with claims which are "trivial, evanescent, temporary, feigned, or imagined, in order to insure that occasional claims of a more serious nature receive judicial resolution." *Id.* To avoid imposing such a burden, courts should require that plaintiffs corroborate their mental distress claims with objective evidence. The best objective evidence is physical manifestation, supported by medical proof of causation.

B. THE PLAINTIFF'S EMOTIONAL DISTRESS MUST BE SEVERE

Even courts adopting the most liberal and non-traditional approaches which do not require physical manifestation of the emotional injury have maintained the requirement that the plaintiff's distress be severe. *See e.g., Camper v. Minor,* 915 S.W.2d 437 (Tenn. 1996). For example, the Tennessee Supreme Court found that "in order to guard against trivial or fraudulent actions, the law ought to provide the recovery only for 'serious' or 'severe' emotional injury." Id. (following *Burgess v. Superior Court* (Gupta), 2 Cal. 4th 1064, 831 P.2d 1197, 1200 (1991); *St. Elizabeth Hosp. v. Garrard,* 730 S.W.2d 649, 653 (Tex. 1987)). A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Rodrigues v. State,* 472 P.2d 509, 520 (Haw. 1960); *Paugh v. Hanks,* 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (Ohio 1983); Plaisance v. Texaco, Inc., 937 F.2d 1004, 1010 (5th Cir. 1991); W. PROSSER AND W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, 54, at 364-65, n. 60.

16 Leslie Benton Sandor and Carol Berry, Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss, 37 Ariz. L. Rev. 1247, 1254 (citing Nancy Levit, Etherial Torts, 61 Geo. Wash. L. Rev. 136, 184-88 (1995), (citing studies to support the proposition that psychological stress induces physical changes, and plays a role in the onset of disease)).

In the case before the Court, the Plaintiff provided no objective evidence that he suffered severe emotional distress. *Buckley v. Metro-North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y. 1995). The district court properly noted that "[d]espite the emotional distress plaintiff claims, he continued working in the Grand Central Terminal even though it is undisputed that he could have transferred to any one of several asbestos-free facilities where both he and his father had previously worked." *Id.* at *3. The district court also pointed out that "even after being warned by a doctor and viewing the videotape about smoking, plaintiff continued to smoke cigarettes whenever I feel like having one.'" *Id.* These facts by no means demonstrate a person suffering from emotional distress severe enough to have a tort claim where there is no accompanying physical injury. The Second Circuit's decision allowing such a tenuous claim in this test case for 140 other plaintiffs should not be allowed to stand as precedent.

C. THE PLAINTIFF MUST PROVIDE MEDICAL PROOF OF THE DISTRESS

This Court should adhere to the traditional common law requirement that the plaintiff provide medical proof or scientific proof of the injury. The common law has steadfastly required medical or scientific proof that the injury was caused by the event as well as the extent and permanency of the injury.[17] The requirement for medical proof not only provides causal connection, it also provides some objective measure of the genuineness and extent of the injury.

In addition, the requirement for medical evidence allows the defendant to test the validity of the plaintiff's complaint and helps the court ferret out nonmeritorious claims. *Paugh v. Hanks,* 451 N.E.2d 759, 767 (Ohio 1983) ("Expert medical testimony can assist the judicial process in determining whether the emotional injury is indeed serious.")

Even courts adopting the most liberal approaches have maintained the requirement that the claimed injury must be supported by expert medical or scientific proof. See *Camper v. Minor,* 915 S.W.2d 437, 446 (Tenn. 1996) ("Finally we conclude that the claimed injury must be supported by expert medical or scientific proof."); *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758, 766-67 (Haw. 1974) ("[t]he plaintiff should be permitted to prove medically the damages occasioned by his mental responses to defendant's negligent act."). As pointed out in Justice Ginsburg's dissent in *Gottshall,* one "solution to this problem - a solution the Court does not explore - would be

17 For earlier courts, "harm" was "distress serious enough to require medical attention." Negligence and the Infliction of Emotion Harm: A Reappraisal of the Nervous Shock Cases, 35 U. Of Chicago L. Rev. 512, 517 (1968).

to require such 'objective medical proof' and to exclude as too insubstantial 'injury' claims lacking this proof. *Gottshall,* 114 S.Ct. at 2418 (Ginsburg, J., dissenting).

In the present case, the Plaintiff offered no medical testimony or any testimony other than his own to support his alleged emotional distress claim. In fact, the medical proof is to the contrary. The medical proof by the physician who examined the plaintiff was that the plaintiff did not display the level of concern worth even considering the need for counseling. *Buckley v. Metro North Commuter Railroad,* 1995 WL 110380 (S.D.N.Y. 1995).

CONCLUSION

Certain safeguards should be firmly established to protect against the "specter of unlimited and unpredictable liability" as this Court described the potential effect on American tort law in *Gottshall. Gottshall,* 114 S.Ct. at 2411. The Second Circuit's ruling which allows a plaintiff to enter the courthouse doors with an alleged emotional distress claim without the common law requirements of being within the "zone of danger" and without any physical manifestation and evidence of the severity of the claim or medical proof to support the claim, discards all of the important limitations placed by this Court on the class of plaintiffs that may recover for emotional injuries. *Id.* at 2405. Maintaining the common law requirements of the zone of danger test and that the emotional injury be serious or severe and established by medical or scientific proof provide objective criteria permitting defendants to test the validity and extent of the injury for which they may be liable. It will also prevent a flood of potential claims based solely upon the plaintiff's subjective complaints resulting from allegations of mere exposure to some potentially harmful substance.

Accordingly, *Amici Curiae,* the Defense Research Institute and the National Association of Manufacturers, respectfully submit that the decision of the Second Circuit should be reversed. The Court should take this opportunity to recognize established common requirements imposed to place rational limits on recovery for negligent infliction of emotional distress and provide guidance to the lower courts.

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Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

(19)

No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD,
Petitioners,
v.
MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-320

METRO-NORTH COMMUTER RAILROAD,
Petitioners,
v.
MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.* For over a decade, ATRA has filed principal *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the recent landmark punitive damages decision in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), and the

* Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court.

medical device "preemption" decision in *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996).

ATRA submits this brief to further this Court's understanding of the specific policy issues presented by medical monitoring damages, a core issue in this case. ATRA urges this Court to reverse the decision of the Second Circuit Court of Appeals.

STATEMENT OF THE CASE

ATRA adopts Petitioner's summary of the dispute in question.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

ATRA submits that decisions about whether to establish complex and revolutionary changes in liability law, if at all, such as the award of damages for so-called "medical monitoring," are best addressed by Congress and state legislatures. A principal reason is that legislatures have the ability to consider diverse points of view and create prospective rules of law. Courts, on the other hand, are not well-equipped to determine complex tort policy rules, because their perspective is typically limited to arguments from opposing counsel seeking to advance purely *private* interests. Further, when courts "make" law, they do so retroactively, denying "fair notice" to the public about rights and responsibilities that may result from significant new changes in the law.

For over 200 years, a fundamental principle of tort law has been that liability should only be imposed when a person has suffered an injury. There is a reason for this basic rule. In order to determine whether money should be transferred from a defendant to a plaintiff, a jury needs some objective manifestation that an individual has been harmed. In this case, however, the Second Circuit Court of Appeals chose to allow an award for "medical monitoring" damages under the Federal Employers' Liability

Act ("FELA"), 45 U.S.C. § 51, even though the plaintiff currently suffers *no harm* and no symptoms of harm.

Whether individuals should receive damages from private parties for medical monitoring is a question for legislatures, not courts, to answer. There are several reasons why this is true.

First, legislatures can devise clear and sound "triggers" that identify the specific circumstances under which a claimant may be eligible for a medical monitoring award; courts have not demonstrated the ability to do so. Second, courts cannot assure that awards for medical monitoring will actually be used for that purpose — tort awards are made in lump sums. The lump sum award could be used for purposes having *nothing* to do with medical monitoring. Legislation could address this problem. Third, courts do not have the scientific knowledge to determine when and if medical monitoring is appropriate. Legislatures are in a better position to obtain such information. Finally, the few courts that have decided to create this "new tort" have given no consideration to the fact that the plaintiff already may have opportunities for medical monitoring under workers' compensation or a health insurance plan. A legislature could consider whether the "new tort" should be limited to people who do not have existing resources that provide for medical monitoring.

In sum, legislative questions deserve legislative answers — they are not questions that can or should be addressed by courts.

ARGUMENT

I. CONGRESS AND STATE LEGISLATURES ARE THE MOST APPROPRIATE FORUMS TO DETERMINE WHETHER A MEDICAL MONITORING REMEDY IS NEEDED AND HOW IT SHOULD BE IMPLEMENTED.

For much of this Nation's history, courts developed tort law in a slow, incremental fashion. That process generally worked well. In recent years, however, the in-

cremental approach has been abandoned in some cases, resulting in potentially large *adverse* consequences to the Nation's civil justice system and those who must abide by its rules.

Early in the asbestos litigation, courts empathetic to the claims of asbestos claimants deviated from accepted legal principles to permit recoveries that traditionally would have been barred. As the courts lowered legal standards, new plaintiffs flooded the civil justice system. While the courts in these cases may have had good intentions, the litigation turned into a judicial "disaster of major proportions." [1] People with very serious harms had to wait long periods of time before courts could hear their cases; some did not live to obtain a remedy. The problem of separating out and quickly assisting seriously injured persons, now caught up in an ever-widening sea of litigation, was so great that the judiciary *sought* congressional intervention to address the crisis, explaining that the "courts [were] ill-equipped to meet [it] effectively." [2]

The legacy of those early decisions continues. In this case, the Second Circuit Court of Appeals embraced a novel theory of recovery (*i.e.*, the award of "medical monitoring" damages) that is contrary to traditional common law principles and has been recognized in only a tiny number of jurisdictions.[3] For over 200 years, the traditional tort law rule has been that a plaintiff must

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[1] Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report of the Ad Hoc Committee* 2 (1991).

[2] *Id.*

[3] *See Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (*"Paoli II"*), *cert. denied sub nom. General Elec. Co. v. Ingram*, 499 U.S. 961 (1991); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Buckley v. Metro-North Commuter R.R. Co.*, 79 F.3d 1337 (2d Cir.), *cert. granted*, 117 S. Ct. 379 (1996).

suffer actual injury before he or she will receive an award in tort.[4] The rationale of the rule is that tort law needs some basic boundaries.

Medical monitoring claims raise difficult and complex issues. These issues are *extremely* broad, and are not subject to judicial control. In that regard, on a daily basis, almost everyone comes into contact with a potentially limitless number of materials that, arguably, may warrant a "medical monitoring" remedy.[5] Who should be eligible for that remedy? Lawyers in the courtroom, however helpful, cannot resolve that key issue.

ATRA submits that decisions to establish retroactive, wholesale, and complex changes in liability law, including the award of damages for medical monitoring, are best addressed by Congress and state legislatures. This is particularly the case where, as here, the underlying cause of action is statutorily-based.[6] Courts may not rewrite the FELA statute to provide medical monitoring damages;

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[4] *Cf. Urie v. Thompson*, 337 U.S. 163, 170 (1949) (a party bringing suit under the FELA suffers a compensable injury only when "the accumulated effects of the deleterious substance manifest themselves") (citation omitted).

[5] Everyone is exposed "to potential health hazards each day through the air they breathe, water they drink, food and drugs they ingest, and on the land on which they live." Terry C. Gay & Paige F. Rosato, *Combatting Fear Of Future Injury And Medical Monitoring Claims*, 61 Def. Couns. J. 554, 562 (1994).

[6] *See generally* Roger S. Fine, *A Personal Perspective from the "Manufacturer,"* 55 Brook. L. Rev. 899, 903 (1989) ("[L]et us go back to the days when there was a real difference between the judicial and legislative branches. When a court is faced with a problem that is a social one rather than a legal one, we defer to the legislature, which has far more flexibility and power to mold solutions that match our problems"); Stephen A. Spitz, *From Res Ipsa Loquitur to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 Ind. L.J. 591, 634 (1990) ("[M]any situations are better left in the legislative domain and/or are best addressed by providing administrative remedies").

it is up to Congress, if it desires to do so, to change the law.[7]

A. Legislatures Are Better Equipped Than Courts To Address The Broad Public Interest In Medical Monitoring.

Courts are particularly well-suited to adjudicate individual disputes concerning discrete issues and parties. The Founding Fathers recognized this when they drafted the Constitution to give the judiciary jurisdiction to decide "cases and controversies."[8] This particularized focus, however, involves some basic limitations; it deprives the judiciary of the comprehensive access to information that is essential to the formation of complex and sound national tort policy rules.

Legislatures, on the other hand, are well-equipped to reach *fully* informed positions about the need for widespread changes in the law. They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives and to use the legislative process to obtain new information. If a point needs further elaboration, a witness can be recalled. This process allows legislatures to engage in broad policy deliberations.[9]

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[7] In an analagous case where a statutorily-based remedy was at issue (*i.e.*, a request for judicial modification of the application of joint and several liability to the Longshore and Harbor Workers' Compensation Act), the Fifth Circuit Court of Appeals recently held: "[T]he Congress is in a better position than a court to evaluate various policy objectives. We are persuaded that deferring to congressional action here is the wiser course." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1138 (5th Cir. 1995).

[8] *See* U.S. Const. art. III, § 2, cl. 1.

[9] *See generally Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 736 (Haw. 1991) (Moon, J., concurring in part and dissenting in part) (disagreeing with the majority's application of "market share liability" to a blood products case, because "[t]here are too many unanswered questions of social, economic, and legal import which only the legislature, with its investigative powers and procedures, can determine"); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) ("[A]warding damages . . . by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain").

Accordingly, legislatures are in the best position to consider whether a medical monitoring remedy is needed, and if it is needed, to resolve its complex issues.[10]

B. Legislatures' Prospective Treatment Of The Law Is Better Suited For Implementing Medical Monitoring Awards Than Courts' Retroactive Treatment Of The Law.

Adoption of a novel remedy, such as medical monitoring, that denotes a sweeping change of the rights and responsibilities of the public, should be done prospectively, if at all, to provide "fair notice" to everyone potentially affected.

Courts, following the common law process, institute their rulings on a retroactive basis. Although this may be appropriate when implementing minor adjustments to common law principles, it is not appropriate when the "adjustments" precipitate a broad, fundamental change in an available tort remedy.

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[10] As this Court has stated, when "[m]any groups of persons with varying interests are vitally concerned . . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups." *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1951). The American Law Institute's new draft Restatement on the law of products liability similarly suggests that when the government has superior access to information, it, rather than the courts, should act. *See Restatement Of The Law Of Torts: Products Liability* § 20 cmt. *a* (Proposed Final Draft (Preliminary Version) Oct. 18, 1996) ("Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding ramifications of such undertakings").

By way of contrast, legislative consideration of medical monitoring will result in prospective legislation that will give the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly. As this Court said in its most recent decision on the subject of punitive damages, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598 (1996) (emphasis added). Courts do not have the ability to provide this "fair notice"; legislatures can.

C. Creating A New Cause Of Action For Medical Monitoring Does Not Represent A Traditional Development Of The Common Law.

It may be argued that the Second Circuit's creation of a "new cause of action" for medical monitoring is simply a traditional development of the common law. This argument does not correspond to the facts.

First, the Second Circuit was not merely developing traditional "common law" without a statutory base. Since 1908, the FELA statute has been in existence and subject to construction based on congressional intent.[11] If changes are needed, Congress can choose to amend the Act.[12] In 1908, allowing a cause of action where an individual was not injured at the time he or she brought

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[11] *See* William Prosser and Page Keeton, *The Law Of Torts*, § 80 at 577 (5th ed. 1984).

[12] As this Court stated in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272-273 (1979) (citations omitted):

> [W]e are mindful that here we deal with the interface of statutory and judge-made law. * * * By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances.

the claim was simply inconceivable.[13] There is nothing in the legislative history or in the common law at the time the FELA statute was enacted that provides even a scintilla of evidence to suggest a basis for medical monitoring damages awards.

Second, the Second Circuit's creation of a cause of action for medical monitoring is different in both form and substance from traditional common law developments in the law of torts. They have been incremental in nature.[14]

For example, the doctrine of contributory negligence had its origin in the English case of *Butterfield v. Forrester*, 103 Eng. Rep. 926 (K.B. 1809). In 1854, a Pennsylvania judge called the defense "a rule from time immemorial" and ventured to guess that it was "not likely to be changed for all time to come." *Pennsylvania R.R. Co. v. Aspell*, 23 Pa. 147, 149 (1854). The judge who wrote the opinion was a poor prognosticator of history, but he must be given some credit as the rule took more than 150 years to change in common law development. In time, exceptions were created to the rule, such as not applying it when the defendant had a "last clear chance" to avoid an accident or where the defendant engaged in "reckless" behavior.[15] Gradually, "comparative negligence" statutes were enacted.[16] But, it was not until 1973 that the first common law decision permitted comparative fault as a general rule, and that was in a state that had already used comparative fault in a wide matrix of specific statutes.[17]

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[13] *See generally* William Prosser and Page Keeton, *supra* note 11, § 54 at 361.

[14] *See id.*, § 80 at 578 (noting that the history of the FELA statute has been one of *"gradual"* liberalization) (emphasis added).

[15] *See id.*, § 66 at 462-464.

[16] *See* Victor E. Schwartz, *Comparative Negligence* (3d ed. 1994).

[17] *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

When other changes have developed in the common law, such as the development of strict products liability, they have occurred gradually. For example, it took almost *fifty* years from the time of then-Judge Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916), removing the privity barrier in product liability negligence cases, before the New Jersey Supreme Court decided *Henningsen v. Bloomfield Motor Co.*, 161 A.2d 69 (N.J. 1960), removing the privity barrier in implied warranty actions involving personal injury. Three additional years passed before Judge Traynor, writing for the California Supreme Court, recognized privity-free strict liability in tort in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Several more years passed before the rule of strict product liability became the common law of most states. *See* John W. Wade *et al.*, *Prosser, Wade and Schwartz's Cases and Materials On Torts* 717 (9th ed. 1994). Even when this expansion occurred, a fault base remained in the key areas of product design and warnings.[18]

The same slow, meticulous, evolvement of the common law has been true with other tort law developments, such as the modification of traditional immunities, permitting recovery for a child who had been injured in the womb, or modification or abolition of the assumption of risk defense.

In point of fact, one can find no example where a court on a common law basis retroactively overruled a fundamental principle of tort law, like the one at issue here, that a plaintiff must suffer a current harm in order to bring a tort claim.

The claim allowed in the instant case occurred without any forewarning or "evolvement" in the case law. The Second Circuit did not engage in a gradual abolition of

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[18] *See Restatement Of The Law Of Torts: Products Liability* § 2 (Proposed Final Draft (Preliminary Version) Oct. 18, 1996).

a traditional defense or incremental development of the common law. Unfortunately, the Court of Appeals' decision represents judicial retroactive legislative lawmaking and is wrong as a matter of history and public policy. If a claim is to be allowed for medical monitoring, as this brief will show, it is a subject for legislative action.[19]

II. COMPLEX ISSUES WHICH SHOULD BE CONSIDERED BEFORE MEDICAL MONITORING IS AWARDED DEMONSTRATE WHY LEGISLATURES PROVIDE A BETTER FORUM THAN COURTS FOR IMPLEMENTING THE REMEDY.

Recognition of the medical monitoring remedy in this case could lead to an administrative "nightmare" that a fully informed judiciary may solidly wish to avoid.

A. Legislatures Are In The Best Position To Establish A Clear And Sound "Trigger" As To When Medical Monitoring Is Appropriate.

Before parties can be given access to medical monitoring, a clear and sound "trigger" must be set to identify the specific circumstances under which a claimant may be eligible for a medical monitoring award.

A proper "trigger" analysis requires access to information from numerous sources, particularly scientific and medical experts, that is only partly available to courts.[20] Legislatures, on the other hand, are not limited to information produced by plaintiffs and defendants; if they need additional information, they may initiate information gathering (*e.g.*, epidemiological studies).

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[19] *See Harrison v. Montgomery Co. Bd. of Educ.*, 456 A.2d 894, 904 (Md. 1983) (stating that the judiciary should defer "to the legislature where change is sought in a long-established and well-settled common law principle").

[20] In addition, in the absence of plaintiff-produced evidence, it is unfair to assign to individual defendants the costs of investigating the "public benefit" of monitoring and treatment for exposures.

In the past, courts have *not* demonstrated an ability to articulate specific or consistent eligibility requirements for medical monitoring. The Second Circuit's vague and ambiguous "standard" in this case illustrates this point well:

> Buckley suffered a substantial impact from asbestos that has significantly increased his risk of contracting an asbestos-related disease and that Buckley should receive medical monitoring in order to ensure early detection . . . .

Buckley, 79 F.3d at 1347.[21]

By way of contrast, Congress and state legislatures have devised effective "triggers" for programs that address and rectify public concerns. For example, the federal Occupational Safety and Health Act, 29 U.S.C. §§ 651-78, and its extensive implementing regulations clearly define permissible exposure levels for hazardous substances used in the workplace and provide for surveillance procedures to determine whether workplaces exceed those levels.[22] In

[21] *See also Ayers*, 525 A.2d at 312 (monitoring appropriate when "there is a significant but unquantified risk of serious disease" such that monitoring is "reasonable and necessary"); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 788 (monitoring appropriate when there is a "significantly increased risk to plaintiff of contracting a serious disease" such that "periodic testing is reasonably necessary"); *Potter*, 863 P.2d at 824 (to recover there must be a "significant, but not necessarily, likely risk of disease" that makes the need for monitoring "reasonably certain").

[22] *See, e.g.*, 29 C.F.R. § 1910.1001(d), (1) & App. H (July 1, 1995) (regulations regarding occupational asbestos exposure). In addition, the federal government formed the United States Preventive Services Task Force, which performed an exhaustive study and published recommendations concerning the effectiveness of clinical preventive services. The latest culmination of the Task Force's efforts is the 1996 *Guide To Clinical Preventive Services* (2d ed. 1996). This publication provides, *inter alia*, a "trigger" for determining whether and how medical monitoring should be conducted to detect disease.

other legislation, Congress has provided for medical monitoring.[23]

Vague and ambiguous medical monitoring "triggers," such as the one set forth by the Second Circuit in this case, do not give the public "fair notice" of medical monitoring eligibility requirements. The resulting uncertainty invariably will lead to inconsistent decisions among jurisdictions, causing disparate treatment of similarly situated plaintiffs. It will also result in costly litigation as parties seek to clarify their rights and duties.[24]

B. Legislatures Are In The Best Position To Ensure That Medical Monitoring Awards Serve Their Intended Purpose.

A significant problem that arises when medical monitoring is awarded by courts, as opposed to legislatures and administrative agencies, is that courts cannot ensure that parties receiving awards will actually use them to procure monitoring.

In most medical monitoring cases, plaintiffs seek,[25] and are granted, lump sum awards.[26] Yet, courts cannot dic-

[23] For instance, Congress created The Agency for Toxic Substances and Disease Registry, which in specific circumstances, may initiate "medical testing . . . of population subgroups to screen for diseases." 42 U.S.C. § 9604(i)(9)(A).

[24] A lack of consistency and specificity in judicially created eligibility standards has proved disastrous in the asbestos litigation. Trials have essentially become "games of chance," because of the lack of clearly delineated standards for recovery. Even when similarly situated plaintiffs have tried their cases in the same jurisdiction, awards have been inconsistent. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1852-1859 (1992).

[25] *See, e.g., Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986); *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847 (M.D. Pa. 1988).

[26] *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 533 (1983). Moreover, it is doubtful that courts have the discre-

tate how damages recipients will spend a lump sum award.[27] The medical monitoring award itself is not appropriately monitored, so there is no assurance that the award, however large, will be used to help a person learn about the onset of avoidable disease.

Legislatures have the power to design medical monitoring programs that provide appropriate testing,[28] and ensure that damage awards, from whatever source, are actually used to pay the expense of medical monitoring. Courts and commentators alike have advocated the use of periodic payment plans to secure the efficient, fair, and proper allocation of medical monitoring awards.[29] Legislatures are well situated to devise and implement periodic payment plans and effectively have done so.[30]

C. Legislatures Are In The Best Position To Ensure That Medical Monitoring Is Only Used When It Confers A Real Benefit.

Medical monitoring should be instituted only if the benefits of testing outweigh the costs. An appropriate cost-benefit analysis in the context of medical monitoring requires the decisionmaker to consider a host of complex and intricately intertwined factors that courts may not have the resources to formulate or weigh.

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tion to award other than lump sums in tort actions. *See Frankel v. United States*, 321 F. Supp. 1331, 1341 (E.D. Pa. 1970), *aff'd sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972); *Lozada ex rel. Lozada v. United States*, 140 F.R.D. 404, 416 (D. Neb. 1991), *aff'd*, 974 F.2d 986 (8th Cir. 1992).

[27] *See, e.g., Ayers*, 525 A.2d at 314.

[28] *Cf.* 29 U.S.C. §§ 651-78.

[29] *See, e.g., Ayers*, 525 A.2d at 314; Amy B. Blumenberg, *Medical Monitoring Funds*, 43 Hastings L.J. 661, 683 n.112 (1992) (*citing* numerous commentators).

[30] State legislatures have passed statutes providing awards through periodic payments for social concerns such as alimony, child support, no-fault automobile liability, medical malpractice, and workers' compensation. *See* Amy B. Blumenberg, *supra* note 29, at 686-687.

For example, the decisionmaker should be required to assess the accuracy of each proposed monitoring test to determine that it is reliable. That assessment should entail an analysis of prevalence (*i.e.*, the proportion of the population with the suspect condition) and the proposed test's scientific sensitivity, specificity, and positive and negative predictive value. Without this assessment, the decisionmaker will not be able to discern risks inherent in the testing procedure, such as the incidence of false positives and false negatives — incorrect test results that can induce destructive psychological reactions, and in the case of false positives, lead to additional testing and treatments that carry a number of additional risks. This single example illustrates the complexity of the cost-benefit analysis that must be conducted prior to determining the viability of a medical monitoring remedy.

As this Court can appreciate, access to a substantial amount of complex, scientific information is imperative to the analysis. Legislatures, with their broad investigative powers and resources, are in a better position than courts to acquire and consider this information.

D. Administrative Burdens Detract From Judicial Supervision Of Medical Monitoring.

Courts are not equipped to handle the administrative procedures needed to ensure that medical monitoring remedies serve their limited purpose. Implementation and administration of a sound plan will require, at a minimum: specifying the nature and amount of benefits available, specifying the source of funding and funding allotments, defining procedures for determining eligibility for monitoring, defining when eligible parties may join the program, and determining program duration and how it will be implemented (*e.g.*, formal versus informal facility testing; designated service provider versus participants'

chosen provider).[31] Moreover, as the program matures, its scope and administrative operation inevitably will require change, especially if the program designer erroneously estimates funding needs or the number of eligible participants.[32]

A further administrative issue arises if third-party payment plans overlap with the medical monitoring program. If an eligible party's monitoring is already covered by a health care insurer[33] and there is no proof of injury, a basic public policy question arises as to whether the "collateral source rule" should apply. Under the rule, benefits received by a claimant from health or medical insurance, disability insurance, workers' accident compensation benefits, and government benefits, in legal terms are deemed "collateral" to the tortfeasor, since the tortfeasor did not pay for them, and are not deducted in calculating the amount of the claimant's alleged damages.[34] Extension of this rule beyond traditional tort law where someone is harmed, to a brand new claim where

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[31] *See* Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 Am. J.L. & Med. 251, 267-272 (1994); Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1985-1986 (1992).

[32] For example, a court-guided trust set up to administer asbestos claims against the Johns-Manville Company "settled [only] 25,000 out of more than 140,000 claims [before] deplet[ing] its funds." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *supra* note 1, at 25.

[33] Approximately eighty percent of all standard medical testing is paid for by third party insurance. *See* American Law Institute, 2 *Enterprise Responsibility for Personal Injury — Reporters' Study* 379 (1991).

[34] *See* John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966). A plaintiff, however, does not necessarily recover double when the collateral source rule is applied. Health insurance contracts, for example, may provide that the insurer is to be subrogated to the insured's tort

an individual suffers no harm, is inappropriate and against public policy.[35]

CONCLUSION

Courts, in accord with constitutional dictates, are not structured to devise and supervise medical monitoring remedies. Legislatures, on the other hand, not only have authority to confront and resolve the broad public policy tort issues raised by medical monitoring, but they also have the necessary tools to do so in a sound manner — access to nearly limitless sources of information and the ability to initiate legislation prospectively. The inappropriateness of a court acting on a matter of legislative priority is particularly acute where the legislative body,

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claim. *See* John W. Wade *et al.*, *Prosser, Wade and Schwartz's Cases and Materials On Torts* § 2 at 522 (9th ed. 1994). There has been substantial criticism of the collateral source rule. *See* American Law Institute, *supra* note 33, at 161-182 (recommending abolition of collateral source rule, except with respect to life insurance); Victor E. Schwartz, *Tort Law Reform: Strict Liability And The Collateral Source Rule Do Not Mix*, 39 Vand. L. Rev. 569 (1986). Recent data suggests that use of the "collateral source" rule contributes to inflated damages claims. *See* Steven Carroll and Allan Abrahamse, *The Costs Of Excessive Medical Claims For Automobile Personal Injuries* (RAND Institute For Civil Justice, March 1995). *See also* Jeffrey O'Connell, *Must Health And Disability Insurance Subsidize Wasteful Injury Suits?*, 41 Rutgers L. Rev. 1055 (1989).

[35] *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W.Va. 1990) (the costs of monitoring awards to asymptomatic plaintiffs could "devastate" defendants), *aff'd*, 958 F.2d 36 (4th Cir.), *cert. denied*, 502 U.S. 1033 (1992); *Ayers*, 525 A.2d at 297 (township liable for over $8,000,000 in monitoring costs). The rule's application becomes more suspect when the eligible party's monitoring tests are no different than those that third parties should submit to who are not at a higher risk for disease. *See Potter*, 863 P.2d at 825; *Redland Soccer Club v. Dep't of Army*, 55 F.3d 827, 848 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). In these circumstances the collateral source rule should not apply, and the eligible party, or his insurer, should bear the testing expense. *Id.*

in this instance Congress, has created the basic remedy and, if it desires to do so, can amend it.

For these reasons, the decision of the Second Circuit Court of Appeals should be overturned.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 16 1996

No. 96-320

IN THE
Supreme Court of the United States
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METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE
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No. 96-320

METRO-NORTH COMMUTER RAILROAD COMPANY,
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MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Owens-Illinois, Inc. ("Owens-Illinois") seeks to assist the Court in its analysis of the medical and scientific issues that serve as the purported foundation for the right of recovery announced by the Second Circuit in this case. Owens-Illinois has substantial experience with those medical and scientific issues. Respondent's medical expert witnesses often testify against Owens-Illinois in trials of asbestos-related personal injury cases. Owens-Illinois also was one of the prevailing parties in *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), in which the Pennsylvania Supreme Court held that the mere presence of a physical sign or "marker" of exposure to asbestos that is detectable by x-ray, but causes no impairment, does not

constitute a compensable tort injury. Owens-Illinois' experience with the medical and scientific issues in this case may be helpful to the Court because the Court has only one-half of a trial record before it. This matter was decided on directed verdict at the close of Respondent's proof and therefore contains a truncated record.

Owens-Illinois manufactured asbestos-containing thermal insulation products for a limited period of time ending in early 1958. More than two decades after it ceased manufacturing and selling such products, Owens-Illinois began receiving literally tens of thousands of personal injury claims arising from alleged exposure to the asbestos contained in those products. To date, Owens-Illinois has resolved more than two hundred thousand such claims. It nonetheless remains a defendant in more than fifteen thousand asbestos-related personal injury cases.

One reason Owens-Illinois continues to be plagued by thousands of asbestos-related claims almost four decades after it last sold the product giving rise to those claims is the wave of new filings by individuals who have x-ray changes consistent with asbestos exposure, but who suffer no current impairment of any kind. These non-impairment claims represent a serious challenge to the ability of the courts of this country to manage asbestos-related litigation. In many jurisdictions, however, affirmative steps have been taken to ensure that such claims are dismissed or placed on administrative dockets so that judicial and party resources are directed toward the claims of individuals alleging actual impairment or death due to asbestos-related diseases.

The decision of the Second Circuit in this matter threatens to create a new category of claims by permitting suit by individuals who are not presently impaired and have *no* detectable physical signs of asbestos-related disease. There is virtually no limit to the number of "exposure only" plaintiffs who would have causes of

action were the decision of the Second Circuit to become the law of the land. The existing asbestos docket control problems confronting the judiciary would pale in comparison to the problems created by this decision.

SUMMARY OF ARGUMENT

I. This case puts squarely before the Court the question whether people who are not sick may nonetheless recover tort damages simply because they were occupationally exposed to a potentially harmful substance—in this case, asbestos.

The problem of functionally unimpaired people filing lawsuits is not new to the asbestos litigation. Until now, however, such claims have generally been limited to plaintiffs who have suffered a clinically detectable physical change caused by asbestos exposure. Most courts that have confronted the issue have held that asymptomatic plaintiffs have not suffered a compensable tort injury and have found that such claims should be dismissed or placed on an inactive docket. For example, the transferee district judge in the federal multidistrict asbestos litigation (Judge Charles Weiner in the Eastern District of Pennsylvania) has "administratively dismissed" more than 18,000 maritime asbestos cases where the plaintiffs were not impaired. (Indeed, Judge Weiner has overseen the resolution of more than 40,000 asbestos cases.) *In re Asbestos Prod. Liab. Litig.*, No. MDL 875, 1996 WL 239863, *1 (E.D. Pa. May 2, 1996). The courts have held that physical impairment is the hallmark of compensable tort injury and that the limited resources of the judiciary and parties involved in this mass tort problem should be directed at those claims that involve actual impairment or death.

II. The Respondent, Mr. Buckley, presents the most extreme form of non-impairment claim, for he admittedly has no clinically detectable changes whatsoever from his alleged asbestos exposure. His is an "exposure only"

claim. His "injury" is limited to theoretical health risks and the fears spawned thereby.

Mere exposure to a substance that may cause harm decades later has never been thought sufficient to support a tort claim, and for good reason. There is no tangible, discernible injury to moor the proceedings. The plaintiff does not even suggest that it is more probable than not that he will someday become functionally impaired, so the trial devolves into a debate about what is theoretically possible.

The judicial system is required to guess which of the "exposure only" plaintiffs that come before it will be the one in twenty (or one hundred, or ten thousand) who will someday realize the injury the risk of which all purportedly share—a guess that will, by definition, often turn out to be wrong. The alternative is to pretend that all plaintiffs will suffer the threatened fate, a decision that will overcompensate all but a tiny statistical minority. All the while, thousands of truly impaired plaintiffs will be required to wait their turn in the litigation queue.

III. The trial court record in this case is a testament to the futility of litigating risk-as-injury. No one knows what level of asbestos exposure Mr. Buckley actually had (no breathing zone measurements were conducted during his alleged exposure), so his experts made "estimates" based upon dubious extrapolations from different workers in different trades in different workplaces at different times. Even those experts, however, admit that Mr. Buckley's exposure is unlikely to lead to any asbestos-related disease.

The rule articulated by the Second Circuit—that people with "massive" exposure to a potentially harmful substance have suffered compensable tort injury even in the absence of physical impairment—is unlimited in scope, unsupported by the trial court record and virtually unprecedented. The better rule of law, and the rule this Court should reaffirm, is that the tort law has limits; that the

judicial system cannot remedy every risk or fear attendant to living and working in a potentially hazardous world; that a tort plaintiff must suffer present physical impairment for there to be a compensable injury.

IV. Medical monitoring should be an item of damages available only to those persons who have a compensable tort injury. The better reasoned decisions in this area are based on the principle that only in the context of a discernible physical impairment can a court deal meaningfully with the concept of future medical expenses. Medical monitoring is very expensive and, if made available to people who are not impaired, would divert resources away from compensating those plaintiffs who *are* impaired.

V. The record in this case does not support Mr. Buckley's claim for the cost of medical monitoring. The theory of relative risk underlying the claim—that any exposure to asbestos, no matter how slight, creates "significant" risk of disease—is both scientifically and logically flawed. Mr. Buckley's smoking habit and other occupational exposures and disease risks were virtually ignored by Respondent's experts pursuant to the theory that a distinct medical monitoring program for asbestos disease could be fashioned independent of the complex array of health care services a person would otherwise require throughout his or her life. There was no proof offered to support that theory, or to establish that such monitoring would provide reliable results or would somehow change the course of admittedly untreatable diseases.

Moreover, the U.S. Preventive Services Task Force found that a "routine chest x-day to screen for lung cancer"—the exact relief Mr. Buckley seeks—is "ineffective." Even Mr. Buckley's expert at trial admitted that no study shows that routine x-rays have any benefit for individuals who, like Mr. Buckley, have both asbestos exposure and a history of smoking cigarettes. Medical monitoring, if

ever appropriate, should be an item of damages only where the monitoring is shown to be medically appropriate and beneficial.

ARGUMENT

I. THE ASBESTOS LITIGATION IS UNMANAGEABLE ONLY WHEN PERSONS WHO ARE NOT PHYSICALLY IMPAIRED ARE NONETHELESS ALLOWED TO MAINTAIN LAWSUITS

As this Court enters for the first time the thicket of asbestos-related personal injury litigation, it must be prepared to separate the facts from the hyperbole surrounding this area of law. Perhaps the most persistent misunderstanding involves the notion that all asbestos-related claims are alike and that the judicial machinery of this nation is grinding to a halt because of the claims of people who are dead or dying as a result of asbestos exposure. While it is true that a tragic number of people have contracted fatal or disabling asbestos-related diseases, their claims represent a relatively small and shrinking proportion of pending claims nationwide.

Asbestos litigation dockets are increasingly dominated by the claims of people, like Mr. Buckley, who are not sick. Until now, asymptomatic plaintiffs would at least point to the presence of non-dysfunctional "pleural plaques" as the basis for their claim. Pleural plaques, also known as pleural thickening, pleural scarring and pleural fibrosis, are the most common of the bodily changes at issue in unimpaired cases. The pleural membrane is a thin tissue covering the lungs and lining the thorax that separates the lungs from the rib cage and diaphragm. This membrane secretes a moistening liquid that allows the lungs to expand during respiration without rubbing against the chest wall. Pleural plaques are a benign change to the pleurae and are generally not in any way disabling or symptomatic. *See In re Asbestos Products Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL

539589, *2 n.8 (E.D. Pa. Sept. 16, 1996); *In re Asbestos Litig. (Mancari and Gajewski)*, No. 347, 1995 Del. LEXIS 323, *1 (Del. Sept. 5, 1995); *Caterinicchio v. Pittsburgh Corning Corp.*, 605 A.2d 1092, 1095 (N.J. 1992) (citing R. Doll & J. Peto, Effects on Health of Exposure to Asbestos 2 (1985)).

When pleural thickening is asymptomatic ("benign"), "individuals are able to lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring." *Simmons*, 674 A.2d 232, 236 (Pa. 1996) (citing *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Hawaii 1990)). Indeed, individuals with asymptomatic pleural thickening cannot feel it; they do not know that they have it; and it is undetectable without the use of an x-ray.

Even with the long latency periods associated with asbestos disease, the claims of death or serious illness arising from occupational exposures from the 1930's through the 1960's have largely been brought and resolved over the last decade. They have now been replaced by even larger numbers of "pleural plaque" claims. It is widely felt that the sheer volume of claims involving this non-impairing condition created a "crisis" in docket control that led to the establishment of MDL 875. *See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 22, 26-27 (March 1991).

The proliferation of such "pleural plaque" claims is not surprising, given the financial incentives for both plaintiffs and their lawyers. Despite the absence of present impairment, the plaintiffs invoke the specter of other disabling or fatal asbestos-related diseases that may yet be contracted. The potential of recovering a large award to cover the risk or fear of future disabling injuries is sufficient to cause thousands of unimpaired plaintiffs to pursue tort claims, particularly since contingency fee arrangements have made participation in this asbestos litigation "lottery" virtually free. As the transactions costs are ef-

fectively transferred to plaintiffs' counsel, the only convenient hedge that the lawyers have against the risk of non-recovery is volume. A large award of "risk" or "fear" damages in a single non-impairment case would subsidize the cost of seeking such awards in all such cases, so the low probability of winning the lottery can be offset by playing often.

Experience in a growing number of jurisdictions has shown, however, that the huge flood of claims by plaintiffs who are unimpaired can effectively be stemmed through a variety of means. As will be discussed more fully below (*see* pp. 17-20, *infra*), most courts that have confronted the issue have concluded—as Owens-Illinois submits this Court should—that claims by plaintiffs who are not ill must be dismissed. *See, e.g., Simmons*, 674 A.2d at 23 ; *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. at 1567-69; *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. 1987), *review dismissed*, 781 P.2d 1373 (1989); *Wright v. Eagle-Picher Indus.*, 565 A.2d 377, 380-81 (Md. App. 1989); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). Other courts have placed such unimpaired claims on inactive dockets until such time (if ever) that an asbestos-related illness develops. *See, e.g., In re Asbestos II Consol. Pretrial*, 142 F.R.D. 152 (N.D. Ill. 1991); *In re Asbestos Cases (Mulligan)*, 586 N.E.2d 521, 523 n.4 (Ill. App. 1991) (noting existence of such inactive dockets in numerous other jurisdictions); *Burns v. Celotex Corp.*, 587 N.E.2d 1092 (Ill. App.), *appeal denied*, 596 N.E.2d 626 (Ill. 1992).

Perhaps the most innovative, fair and practical responses to the challenges of asbestos-related litigation have come from Judge Charles Weiner in the context of MDL 875, the multidistrict litigation that has, since 1991, encompassed all asbestos-related claims pending in the federal courts. Judge Weiner has overseen resolution of more than 40,000 of the almost 59,000 asbestos-related cases that

have been brought before him. *In re Asbestos Products Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL 239863, *1 (E.D. Pa. May 2, 1996). When faced with more than 18,000 maritime cases from claimants who, according to the materials produced by the plaintiffs' counsel, were not ill, Judge Weiner "administratively dismissed" those cases without prejudice and with all statutes of limitation tolled. *Id.* at *4. Judge Weiner's answer to the problem of unimpaired claims, which explicitly preserves the right of the plaintiffs to "maintain an action should their circumstances warrant the furtherance of their case," *id.*, is precisely the type of resolution calibrated to retain fairness and balance in the asbestos-related litigation.

Mr. Buckley's case, of course, represents a new and even more extreme version of the non-impairment claim: as discussed below, he does not even have pleural plaques. Mr. Buckley's only purported tort injury is the mere fact of exposure to a potentially harmful substance.

This case therefore squarely presents the question whether asbestos-related personal injury litigation should be restricted to plaintiffs who at least claim to be presently impaired, or whether it should be thrown open to plaintiffs who admittedly are functionally normal. Many lower courts have taken responsible steps to restrict the litigation to those who can show present physical impairment, and that answer to the problem is equally applicable here. This Court should be careful not to undue the work of Judge Weiner and his colleagues in the federal and state judiciaries who have found ways to avert a real asbestos crisis.

II. MR. BUCKLEY'S EXPOSURE TO ASBESTOS WILL NOT AUTOMATICALLY—OR EVEN PROBABLY—LEAD TO ILLNESS

A. Mr. Buckley Is Not Presently Impaired

It is undisputed that Mr. Buckley is not sick or in any way impaired by his exposure to asbestos. His Amended

Complaint admits that fact: "[T]he plaintiff is *not* bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness." (J.A. 17) (emphasis added).

His own expert witness, Dr. Markowitz, testified that Mr. Buckley's breathing and chest x-rays are both "normal" (J.A. 73-74) and that Mr. Buckley exhibits "absolutely no [evidence of] asbestos-related disease." (J.A. 118). Indeed, Mr. Buckley is able to walk fifteen to twenty miles per week and can climb seven flights of stairs "with no difficulty." (J.A. 173).

B. Exposure Does Not Equal Disease

Mr. Buckley's good health is hardly surprising, common misconceptions about asbestos-related disease notwithstanding. Asbestos exposure is ubiquitous in this country: "Everyone in any urban environment has some asbestos exposure." (J.A. 108). Even if one considers only occupational exposures, the plaintiff's proof was that, in just seven industries, more than 16 million individuals have asbestos exposure. (J.A. 280-81).

Asbestos exposure, however, simply is not the equivalent of asbestos disease. The body has extensive, multifaceted defense mechanisms that protect us from inhaled substances, including asbestos. (J.A. 109). Standard texts in the field conclude that these mechanisms clear from the lungs the overwhelming majority of inhaled asbestos fibers:

> Many inhaled asbestos fibers, as with dust in general, are also effectively entrapped and cleared. A study by Evans, et al. in an animal model suggested that two-thirds of the inhaled fibers were trapped in the larger airways, thus greatly limiting the potential peripheral burden. By the end of the first month, it was further observed that clearance had eliminated three-fourths of the particles that reached the distal airways.

D. Dail and S. Hammer, Pulmonary Pathology 919 (2d ed. 1994)(footnote omitted).[1] Those fibers that remain are then attacked at the cellular level by scavenger cells called macrophages. (J.A. 79).

Even Mr. Buckley's expert witnesses admit that the incidence of asbestos-related disease is dose-related. (J.A. 110). Beyond that factor lie questions of individual susceptibility, for it is undisputed that people with virtually identical exposure histories experience dramatically different results for reasons medical science cannot explain.

What medical science can and does explain, however, is that asbestos-related disease does not occur, except at certain discernible levels of exposure. *See, e.g.*, B. Mossman, J. Bignon, M. Corn, A. Seaton, J. Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, Science, Jan. 1990, at 198. A standard text on occupational lung disorders states, "The threshold of exposure below which clinical evidence of asbestos would not appear has been put conservatively at 25 fibres/ml years.[2] Epidemiological evidence suggests a slightly higher exposure threshold for increased lung cancer risk." W. Parkes, Occupational Lung Disorders 482 (3d ed. 1994) (citations omitted). That same text also states, "The lowest estimated cumulative exposure on record resulting in a mesothelioma appears to be of the order of 5 fibres/ml year . . . ." *Id.* at 474.

While the plaintiff's experts did not contest much of the foregoing (e.g., "[L]ower levels of exposure are needed for

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[1] One of the authors of that text, Dr. Hammar, is commonly called by the *plaintiffs* to testify in asbestos-related personal injury trials.

[2] Exposure levels are customarily expressed in terms of the number of asbestos fibers per milliliter of air. The cumulative exposure of any individual is customarily expressed as the average exposure level experienced by the individual over the course of his/her working life, multiplied by the years of exposure. For example, an average exposure of 5 fibers/ml for 5 years would result in a cumulative exposure of 25 fibers/ml years.

mesothelioma than to produce asbestosis" (J.A. 66)), they did claim that a hypothetical *risk* of disease—as opposed to actual *incidence* of disease—occurs at any level of exposure, no matter how slight. According to Dr. Markowitz, "There is no established safe level . . . [I]f there is any exposure, there is some level of risk." (J.A. 58). Dr. Nicholson went even further, claiming that exposure to barely measurable levels of asbestos in the ambient air will result in asbestos disease, thus putting "every one of us in the United States" at risk of developing an asbestos-related disease. (J.A. 310-11). The level at which risk begins, according to Dr. Nicholson, is "any exposure to asbestos whatsoever." (J.A. 336).

There are, in the eyes of the medical and scientific community, many difficulties with Dr. Nicholson's "one fiber" theory of asbestos risk. *See generally* K. Brown, *Asbestos-Related Disease and the "One Fibre" Theory*, Occupational Health Review (Oct./Nov. 1987). For present purposes, the most telling shortfall is one admitted by Dr. Nicholson himself:

> Q. You don't have any hard data to support this do you?
>
> A. Other than the linearity of data at higher exposures, . . . a specific experiment to validate effect, to identify effects for low exposure, is not feasible.
>
> * * * * *
>
> Q. you would agree that there is [sic] no data currently available that actually reports the incidence of asbestos-related cancers beyond that expected at exposure below .025 fibres per milliliter?
>
> A. I completely agree with that.

(J.A. 336, 352).

The most that can be said, then, about the evidence before the trial court is that the plaintiff did not even suggest, much less prove, that exposure to asbestos inevitably, or even likely, results in disease. Rather, if the plaintiff's experts are to be believed (despite an admitted lack of supporting data), Mr. Buckley—like virtually every other American—has a theoretical possibility of developing an asbestos-related disease. That risk, argues the plaintiff, should be held to constitute a compensable injury.

III. ONLY PERSONS WHO ARE PHYSICALLY IMPAIRED HAVE A COMPENSABLE TORT INJURY

A. Unimpaired Plaintiffs Have No Compensable Injury

This case centers on the question, *when*, if ever, does an asbestos-exposed individual suffer a compensable tort injury? Does every person who has been exposed to asbestos have a compensable tort injury for emotional distress or fear of disease, simply because we know, to a reasonable degree of scientific certainty, that exposure to asbestos causes some kind of change to their bodies at the cellular level? If not, what sensible line can be drawn to distinguish those asbestos-exposed persons who have compensable tort injuries from those who have no such injury?

Owens-Illinois submits that the line must be drawn at physical impairment—plaintiffs who do not claim to be sick should not be allowed to recover damages. Mr. Buckley, and other unimpaired plaintiffs, would draw the line much differently, but their notions of compensable injury are so broad as to be wholly unworkable.

In this case, Mr. Buckley faced the quandary of showing that he had suffered a "physical impact" from his asbestos exposure without the benefit of any "verifiable clinical signs" of that exposure. (J.A. 641). Indeed, as demonstrated in Section II *supra*, Mr. Buckley could offer no proof of bodily change—much less physical impairment—as a result of his exposure to asbestos.

In the absence of illness or even a detectable bodily change, the Second Circuit drew the compensable injury

line based upon presumed (though unproven) cellular changes ("impact") and the theoretical risk arising from the claimant's exposure to asbestos. The court did not designate any precise quantum of exposure necessary to establish this "injury." Indeed, it turned a blind eye to the plaintiff's statistical estimates concerning risk, such as they were, and simply announced that Mr. Buckley was entitled to recover because his asbestos exposure was "massive, lengthy and tangible." (J.A. 645). The court offered no guidance as to how other courts are to determine whether exposure in other cases is sufficiently "massive, lengthy and tangible" to give rise to a cause of action.

There is, of course, no sound authority for this remarkable finding. Indeed, as argued below, it is directly contrary to a number of decisions, most notably, the Third Circuit's decision in *Schweitzer*.

Perhaps more fundamentally, there is no basis in this record to draw a distinction between "massive" exposure versus "moderate" or "limited" exposure. The fact is that plaintiff's experts could not accurately quantify Mr. Buckley's exposure because no dust counts were taken while he was working with asbestos-containing materials. Rather, Dr. Markowitz was content merely to characterize the exposure. Interestingly, he did not use any of the adjectives used by the Second Circuit; instead, he said only that Mr. Buckley had "quite a bit of exposure." (J.A. 181). It was, he opined, "roughly equivalent to the kind of . . . exposure that some shipyard workers have." (J.A. 189).

Dr. Nicholson was unable to do much better. "I estimated that Mr. Buckley's one-hour exposure was similar to the insulators in the early years, in the 50's and 60's and 70's." (J.A. 238). The problem, he said, was that insulators did not ordinarily remove asbestos-containing insulation, they applied it; Mr. Buckley did not apply insulation, he removed it (in order to do pipefitting work).

(J.A. 236-38, 255). Dr. Nicholson admitted that these activities involved different exposure conditions over different lengths of time, so he made up a ratio, declaring one hour of Mr. Buckley's asbestos removal work equivalent to eight hours of insulators' asbestos application work. (J.A. 236-38). He then made an adjustment based upon the supposed "fact" that all insulators worked for twenty-five years under constant exposure conditions, while Mr. Buckley's alleged exposure lasted less than three years. *Id.*

Dr. Nicholson was not yet finished. He opined that 30% of all insulators die of cancer. (J.A. 243). He apparently assumed that all of those cancers were caused by asbestos, for he extrapolated Mr. Buckley's *asbestos*-related cancer risk to be 3/25ths (the supposed exposure ratio of Mr. Buckley to all insulators) of 30%, or 2.3%. (J.A. 243-44). Admitting some "uncertainty" in his calculation, he expanded the range of increased cancer risk to "1 percent to 5 percent." (J.A. 244).

No legal standard based upon this form of statistical sleight-of-hand can bear rational scrutiny or be applied fairly in the myriad factual circumstances of the thousands of "exposure only" claims that are sure to follow. Dr. Nicholson's exposure "estimate" flies in the face of the dust counts actually taken in Grand Central Station during the relevant period (albeit not specifically during Mr. Buckley's alleged exposure)—all of which were at or below .01 fibres/ml (less than 1/10,000th of Dr. Nicholson's high-end estimates for removal work). (J.A. 334). Dr. Nicholson's own published exposure levels for insulators were only 3 fibres/ml, a fraction of the level he assumed in his "estimate." (J.A. 324-25).

The Second Circuit's resort to mere adjectives to establish the line between compensable tort injury and no cause of action—"massive, lengthy and tangible" exposure—is understandable in the face of Dr. Nicholson's "estimate." It remains, however, no standard at all.

B. The Line For Compensable Tort Injury Should Be Drawn At Physical Impairment

Mr. Buckley seeks to divorce pain, disfigurement, or loss of function from the test for compensable injury, thereby eliminating from this area of tort law any notion of functional injury. Under this view, which the Second Circuit adopted below, individuals are entitled to compensation not because they cannot breathe, work, play or live normally, but rather because there is evidence of non-impairing asbestos-related exposure and presumed cellular changes that the individual otherwise had no reason to know existed.

If functional impairment is to be abandoned as the essence of tort injury, why draw the line at "massive" exposure"? Why exclude "moderate" exposure? The honest answer is that, once the requirement of functional impairment is lost, there is, according to Dr. Nicholson, no subset of an asbestos-exposed population that lacks a colorable claim of "injury."

As medical technology advances, so does our capacity to detect the body's cellular (or even sub-cellular) reaction to exposures, infections or traumatic events. Medical science can now demonstrate that the human body reacts to inhaled asbestos (and any number of other inhaled substances) almost immediately. *See, e.g., J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 505-06 (Pa. 1993). These advances, while stretching our scientific horizons, also threaten to stretch beyond recognition the boundaries of our tort law. A physiological change is not compensable simply because it is detectable. To allow recovery of compensatory damages for presumed cellular changes or risks of future disease, in the absence of present functional impairment, would open almost infinite areas of tort liability.

The costs of such a rule would be enormous. While unimpaired plaintiffs have no lost earnings and have experienced no physical pain, cases like this one demonstrate that each would allege emotional distress caused

by fear of an impairing asbestos-related illness that he or she does *not* have. The asbestos litigation "lottery" would thus be expanded, and the transactions costs of litigating the speculative claims of non-impaired plaintiffs would be staggering.

As a growing number of jurisdictions have come to recognize, the line of demarcation simply must be drawn at functional impairment. Although even that cannot provide a perfectly administrable standard, malignancies are easily detectable and other types of functional impairments are objectively discernible by pulmonary function testing. *See, e.g., In re Asbestos II Consol. Pretrial*, 142 F.R.D. at 156-57.

Among the most influential decisions in this area is *In re Hawaii Federal Asbestos Cases*. That court found:

> Plaintiffs must show a compensable harm by adducing testimony of a *functional impairment* due to asbestos exposure. A claimant's subjective testimony as to shortness of breath and fatigue without more is not sufficient. In other words, the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by an objectively verifiable functional impairment is not enough.

734 F. Supp. at 1567 (emphasis in the original).

The Maryland Court of Special Appeals also found that asymptomatic pleural thickening is not a legally compensable injury. *Owens-Illinois, Inc. v. Armstrong*, 591 A.2d 544, 561 (Md. App.), *rev'd on other grounds*, 604 A.2d 47 (Md. 1991), *cert. denied*, 506 U.S. 871 (1992). That court pointed to Section 7 of the Restatement (Second) of Torts (1965), noting that it identifies "harm" as a necessary element in a cause of action for negligence and strict liability. Comment b to Section 7 further explains that: " '[h]arm' implies a loss or detriment to a person, and not a mere change or alteration in some physical person . . . In so far as physical changes

have a detrimental effect on a person, that person suffers harm.' " *Id.* Moreover, as other courts and commenators have noted, " '[t]he threat of future harm, not yet realized, is not enough.' " *Jaquays*, 752 P.2d at 30 (quoting Prosser and Keeton on the Law of Torts § 30 at 165 (5th ed. 1984)).

Another major decision on this subject was the Pennsylvania Supreme Court's recent ruling in *Simmons v. Pacor, Inc.* That court denied recovery for asymptomatic pleural thickening, holding that illness is required for recovery in asbestos-related litigation, including claims for emotional distress damages. 674 A.2d 237-38. The Third Circuit issued a landmark statement on this issue in *Schweitzer:*

> It is true that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. [citations omitted] Likewise, the existence of such injury may be of vital concern to insurers . . . . We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law . . . . *Requiring manifest injury as a necessary element of an asbestos-related tort action . . . best serves the underlying purpose of tort law: the compensation of victims who have suffered.*

Schweitzer, 758 F.2d at 942 (emphasis added); *see also Caterinicchio*, 605 A.2d at 1096 (finding no reported decision holding that pleural thickening constitutes a compensable injury); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 89 (3d Cir. 1986) (district court properly excluded evidence of increased risk of future cancer where plaintiff had pleural thickening but could not establish that he would be more likely than not to experience cancer in the future); *Jaquays*, 752 P.2d at 31 (finding "no reason to depart from traditional tort concepts and allow recovery for injuries before any disease becomes manifest"); *Pollock v. Johns-Manville Sales Corp.*, 686 F. Supp. 489, 491-92 (D.N.J. 1988) (plaintiff with pleural thickening could not litigate the issue of increased risk of cancer because he could not show the risk was more probable than not).

As the *Schweitzer* court indicated, the underlying purpose of tort law is to provide compensation to people with actual damages. Failure to require impairment for recovery would seriously undermine that goal. It is widely recognized that asbestos litigation transaction costs are potentially overwhelming. The Judicial Conference Ad Hoc Committee termed those transaction costs "unconscionable." *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* at 13. The system cannot afford to allocate scarce judicial and party resources to the adjudication of a virtually endless stream of claims brought by asbestos-exposed individuals who are not ill as a result of that exposure.

As courts have noted, to rule otherwise would inevitably result in a gross misallocation of compensatory damages. *See, e.g., Marinari v. Asbestos Corp.*, 612 A.2d 1021, 1026-27 (Pa. Super. 1992). Those who never actually develop asbestos-related illnesses would be overcompensated, having been paid for fears that proved to be unfounded. Those who did develop asbestos-related illnesses would likely be undercompensated, due to a probability-based discounting by the jury.

Requiring the actual occurrence of asbestos-related illness in order to bring suit, and then awarding damages for all past, present and future pain and suffering related to that illness, ensures that adequate compensatory damages are channeled to those who are most entitled to them. The filing of new claims will continue to be subject to a rational filter. Those that are filed can be resolved based upon concrete proof of illness, not dubious statistical projections of hypothetical risks.

Will reversing the Second Circuit's decision serve as a panacea for the asbestos litigation problem confronting the nation's courts? No, there is no simple, comprehensive answer that any court or party has yet devised to this seemingly intractable problem.

A strong statement from this Court rejecting claims by unimpaired plaintiffs will, however, make a bad situation materially better. Such a statement will help ensure that lower courts and the parties will be able to concentrate scarce resources on claims of actual illness and that progress in reducing the backlog of such claims will not simply be erased by the next wave of unimpaired claims.

IV. THE COSTS OF MEDICAL MONITORING SHOULD BE LIMITED TO PERSONS WITH A COMPENSABLE TORT INJURY

If this Court finds that plaintiffs who are not ill from exposure to asbestos have no compensable tort injury, it should also find that such claimants cannot recover for the costs of a lifetime of medical monitoring. The Second Circuit's decision to allow Mr. Buckley to recover on his claim for medical monitoring is a departure from the traditional and sound legal principle that there can be no cause of action for damages in tort without the presence of actual physical injury at the time of the suit.

Although the lower courts are divided as to whether unimpaired plaintiffs can recover for medical monitoring,[3]

[3] Some courts, including the Second Circuit below, have held that proof of mere exposure to a harmful substance is sufficient to recover medical monitoring costs. (J.A. 649) (allowing recovery for medical monitoring "despite the fact that [Buckley] has yet to suffer an asbestos-related disease"); *see also Jaquays*, 752 P.2d at 33-34 (allowing recovery for medical monitoring despite rejecting other compensatory damages claims); *Meyerhoff v. Turner Const. Co.*, 534 N.W.2d 204, 206 (Mich. App. 1995) (allowing medical monitoring costs for exposure to asbestos absent present injury), *appeal denied*, 550 N.W.2d 535 (Mich. 1996); *Redland Soccer Club v. United States Dep't of the Army*, 55 F.3d 827, 845-48 (3d Cir. 1995) (allowing recovery for medical monitoring claim despite lack of present injury where plaintiff can prove "significant exposure"), *cert. denied*, 116 S. Ct. 772 (1996); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 980 (Utah 1993) (allowing recovery for medical monitoring despite lack of injury where plaintiff can show that a reasonable physician would prescribe a different monitoring regime than if not exposed). The Pennsylvania Supreme Court in *Simmons* suggested that medical monitoring should be available to individuals with occupational exposure to asbestos *and* non-dysfunctional pleural plaques. 674 A.2d at 239.

Other courts have required the plaintiff to prove that an injury is "reasonably certain to occur" as a result of toxic exposure or that there is a "reasonable medical probability" of it occurring. *E.g., Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 319 (5th Cir. 1986); *Mauro v. Raymark Industries, Inc.*, 561 A.2d 257, 266 (N.J. 1989); *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 821-23 (Cal. 1993).

the better-reasoned decisions have barred such claims based on a compensable injury requirement. For example, the Fourth Circuit, in rejecting medical monitoring damages in a toxic exposure case, found that "[a] claim for medical surveillance costs is simply a claim for future damages . . . such relief only is available where a plaintiff has sustained a physical injury that was proximately caused by the defendant." *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991), *cert. denied*, 503 U.S. 1033 (1992). *See also Thomas v. FAG Bearings Corp., Inc.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994) ("[e]ntitlement to the costs of future medical monitoring requires plaintiff to prove actual present injury and an increased risk of future harm"); *Werlein v. United States*, 746 F. Supp. 887, 904 (D. Minn. 1990) (permitting medical monitoring only where "a given plaintiff can prove that he has present injuries"); *Catasauqua Area School Dist. v. Eagle-Picher Indus., Inc.*, No. 85-3743, 1988 WL 102689 at *1 (E.D. Pa. Sept. 28, 1988) (mere exposure to asbestos is not an injury that supports medical monitoring); *Purjet*

v. Hess Oil Virgin Islands Corp., No. 1985/284, 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1986) (medical monitoring only appropriate where there is an actual injury); *Meganthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (summary judgment in favor of defendant where plaintiff alleged no present injury); *Hayes v. AC&S, Inc.*, No. 95-CH-1835, at 13-14 (Cook County, Ill. Oct. 30, 1996) (rejecting claim for medical monitoring for exposure without manifest symptoms).

These decisions flow from the principle that only in the context of a discernible physical impairment can the courts deal meaningfully with the concept of future medical expenses. The physical impairment requirement moors the inquiry to a specific condition and course of treatment. While consideration of future medical expenses is perhaps inherently speculative, the courts have properly reasoned that the present impairment requirement provides the necessary boundaries to ensure rational results.

The Second Circuit ignored those boundaries, choosing instead to link medical monitoring to subjective characterizations of exposure provided by the plaintiff himself, augmented by an "estimate" of exposure (and consequent risk) worthy of Rube Goldberg. That rule has no meaningful limiting principles and should be rejected by this Court.

There is an inaccurate perception that medical monitoring is a relatively inexpensive means for providing compensation to individuals who have been exposed to a toxic substance; in fact, the costs for medical monitoring in toxic tort cases can be "staggering." E. Wiechmann, *Curse of the Unsick: Update on Latent Injury Claims in Toxic Tort Cases*, 25 Brief 10, *44 (Summer 1996). In the seminal medical monitoring decision by the New Jersey Supreme Court, the total compensatory damages awarded at the trial level were $24,058,892, with more than one-third ($8,204,500) attributable to medical monitoring costs. *Ayers v. Township of Jackson*, 525 A.2d 287, 291 (N.J. 1987).

Permitting damages for medical monitoring where there is no evidence of an actual asbestos-related illness could divert untold millions of dollars away from compensation to the injured and toward costly medical tests—or straight cash awards—for the uninjured. The result would be a windfall for healthy plaintiffs who never manifest injury and insufficient compensation for those who are sick now or become sick later.

Perhaps the most significant question raised by Mr. Buckley's bid for medical monitoring damages is where this type of compensation would stop. If Mr. Buckley is able to recover money for his future medical care based solely on his exposure to asbestos, could he then recover further medical surveillance costs for his alleged exposure to other toxic substances?

The Amended Complaint alleged that Mr. Buckley "has and will in the future incur medical expenses for the testing and monitoring of his medical condition related to his exposure to harmful amounts of hazardous materials, including *but not limited to asbestos*." (J.A. 17) (emphasis added). As one set of commentators has pointed out, with an estimated thirty-eight percent of all cancers attributable to occupational exposure to toxic chemicals and 50,000 hazardous waste sites in the United States, "in the very near future we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances and to get medical experts to testify that the exposure significantly increased our risk of disease . . . ." S. Martin & J. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 130 (1995). To follow the Second Circuit's view of when medical monitoring costs should be awarded would be to fill the courts with cases of dubious merit and to allow an ever-increasing per-

centage of damages awards to go to litigation expenses instead of for truly compensatory purposes.

V. MEDICAL MONITORING IS NOT JUSTIFIED ON THIS RECORD

Bad factual records make bad law, as this case threatens to prove. The plaintiff's proof was not that "massive, lengthy and tangible" exposure to asbestos creates the type of disease risk that justifies medical monitoring. Rather, it was that virtually *any* exposure to asbestos—even exposure *below* the OSHA standard of .1 fiber/ml—creates "a significant risk" of disease. (J.A. 356).

It mattered not to the plaintiff's experts, for example, that the absolute risk of lung cancer from asbestos exposure among a population of insulators (not pipefitters) is, according to their selected authorities, only 55 per 100,000 of population per year—a risk of approximately 1/20th of 1%. *Dafler v. Raymark Indus. Inc.*, 611 A.2d 136, 140 (N.J. Super. 1992), *aff'd*, 622 A.2d 1305 (N.J. 1993). It was enough that asbestos exposure purportedly increases the *relative* risk of lung cancer five times over background. (J.A. 62).[4]

It also mattered not to the plaintiff's experts that Mr. Buckley smoked approximately a pack of cigarettes per day for twenty years, because he had recently cut back to one cigarette per day. According to Dr. Markowitz, Mr. Buckley had only "some risk" of smoking-related cancer, a risk that supposedly was less than three to five times that of a non-smoker. (J.A. 163). According to Dr. Nicholson, eighty to ninety percent of that excess

[4] Even this five-fold relative increase is based on a single study published seventeen years ago and premises the increased risk on four lung cancer deaths in insulation workers. (J.A. 150-57). Moreover, these were insulation workers who, although they may have smoked cigarettes, in the estimation of the researchers they "never smoked regularly." (J.A. 156).

smoking risk would disappear within ten years of quitting the smoking habit. (J.A. 250-51).

Even a cursory review of the Surgeon General's most recent data on smoking-related cancer risks shows that the Second Circuit was palpably misled. Current male smokers who smoke 1 to 20 cigarettes per day have 18.8 times the lung cancer risk of non-smokers. D. Shopland, H. Eyre, T. Pechacek, *Smoking Attributable Mortality in 1991: Is Lung Cancer Now the Leading Cause of Death Among Smokers in the United States?*, J. of the Nat'l Cancer Inst. 83, 1143 (Aug 21, 1991) (quoting data from Centers for Disease Control, Public Health Consequences of Smoking—25 Years of Progress. A Report of the Surgeon General, 1989, DHHS Publ. No. (CDC) 89-8411 (1989)).

During the first year of quitting smoking, that lung cancer risk actually goes *up* to 26.7 times background. *Id.* Ten years after quitting, the risk is still 8.7 times background. *Id.*

The point here is that Mr. Buckley has a dramatically increased risk of lung cancer due solely to his smoking habit. As one author has noted, of the hundreds of thousands of lung cancers occurring in this country annually, "85 to 90% . . . are attributable to cigarette smoking, whereas as few as 2% of cases may be related to asbestos exposure." V. Roggli, *Human Disease Consequences of Fiber Exposures: A Review of Human Lung Pathology and Fiber Burden Data*, 84 Envtl. Health Perspective 301 (1990) (citation omitted).

It is one thing to suggest that asbestos defendants provide the functional equivalent of HMO services to individuals with diagnosed, impairing asbestos-related diseases. In the face of such confounding hazardous exposure, to suggest that they do so where no such present injury from asbestos exposure exists is uprecedeted and unfair.

The problems with Mr. Buckley's medical monitoring claim, and the Second Circuit's opinion concerning same,

do not end there. The purpose of medical monitoring is supposed to be to improve the plaintiff's prognosis through early detection of disease. The record here, however, is that monitoring will confer no meaningful benefit because the asbestos-related diseases about which Mr. Buckley claims to be concerned are untreatable: "Lung cancer is still largely an incurrable disease." (J.A. 60). As for mesothelioma, "There is no successful treatment in the sense of a cure." (J.A. 56). Unfortunately, the same is also true for asbestosis: "[T]here is nothing we can do about it." (J.A. 65).

The Second Circuit took no account of the fact that, when medical monitoring is viewed not as a litigation construct, but rather as a scientific discipline, important governing principles emerge. According to the U.S. Preventive Services Task Force, monitoring procedures can only be justified where they have proven effectiveness, they produce neither false positives nor false negatives at unacceptable levels, they "avoid[] harm to asymptomatic patients," and they have been shown that "they improve clinical outcome." U.S. Preventive Services Task Force. Guide to Clinical Preventive Services xxxi (2d ed. Williams & Wilkins 1996).

Applying these principles, the Task Force specifically found that a "routine chest x-ray to screen for lung cancer"—the very relief sought here—is "ineffective." *Id.* The Task Force is not alone in reaching this conclusion:

> Because of the available evidence, virtually all organizations concur that screening for lung cancer is not justified. For example, the American Cancer Society, the American College of Radiology, the National Cancer Institute, the U.S. Preventive Services Task Force, and the Canadian Task Force on the Periodic Health Examination all decline to recommend lung screening with any test at any frequency.

D. Eddy, Common Screening Tests 322 (Am. College of Physicians 1991) (citations omitted). Even Dr. Markowitz admits that no study has been conducted to support the alleged utility of chest x-rays for indivduals with a combination of asbestos exposure and a history of cigarette smoking. (J.A. 164).[8]

Owens-Illinois respectfully submits that recharting the course of asbestos-related litigation to encompass medical monitoring for all asbestos-exposed individuals who can find an expert witness to declare their "estimated" exposure to be "significant" is both unwise and unnecessary. No scientific principles articulated in this record justify such a step. No material benefit to plaintiffs has been shown. The transactions costs of litigating the medical monitoring rights of all exposed persons would threaten to overwhelm both the judicial resources of the civil justice system and the financial resources of that subset of asbestos defendants who have thus far avoided bankruptcy.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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December 16, 1996

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[8] As noted *supra*, Dr. Nicholson takes the extreme position that *any* exposure to a carcinogen will produce cancer; he also believes that this "no safe level" analysis applies equally to radiation. (J.A. 261). The logical implication of those views is that annual chest x-rays as part of a medical monitoring regime would actually generate cancers.

No. 96-320

(21)

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF OWENS CORNING IN SUPPORT OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-320

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

-v-

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF OWENS CORNING IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Owens Corning is the largest solvent defendant remaining in the asbestos personal injury litigation. As of June 30, 1996, Owens Corning had received nearly 330,000 asbestos claims since the 1970s, of which almost 190,000 were filed in the last

five years. Overall, Owens Corning has resolved almost 177,000 claims (the overwhelming majority by settlement) with another 152,000 pending. Virtually all of these claims are based on exposure to an asbestos-containing high-temperature insulation product which Owens Corning stopped making in 1972.

By mid-1996, Owens Corning and its insurers had paid well over $1.9 billion in indemnity costs to resolve asbestos personal injury claims. The Company estimates that its total future cost for asbestos personal injury claims will be another $2.1 billion, of which amount less than 30% will be covered by insurance.

Of the enormous numbers of claims, however, only a small minority involve serious injuries. For instance, only a fraction of the claims involve malignancies such as mesothelioma or lung cancer; by far, the largest numbers of cases involve mild forms of non-malignant conditions which result in little or no functional illness or impairment. A large proportion of the more recently filed claims appears to be the product of mass x-ray screenings designed to detect pleural changes in the lungs of individuals who have been occupationally exposed to asbestos but who have not experienced any impairment of lung function or other symptoms of asbestos-related disease. Because of uncertainty concerning the ultimate disposition of these large numbers of nonimpaired cases, Owens Corning has told its shareholders that the total future cost of the asbestos litigation may exceed even the Company's $2.1 billion estimate.

The decision below has the potential to expand vastly the asbestos litigation beyond its already unprecedented scale. Although this case arose under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, this Court has emphasized that FELA generally reflects common law principles of negligence and causation. Not surprisingly, therefore, FELA decisions routinely are cited in cases decided under the common law, and FELA cases frequently help to shape the development of common law doctrines. By permitting claims for negligent infliction of emotional distress and the recovery of medical monitoring

damages based on asbestos exposure alone, the Second Circuit has embraced a rule that, if adopted generally, would threaten to overwhelm defendants such as Owens Corning while swamping the court system.

Owens Corning submits this brief in support of petitioner pursuant to Rule 37.3(a) of the Rules of this Court. Letters of consent are being filed together with this brief.

SUMMARY OF ARGUMENT

Ten years and at least 200,000 claims ago, the Court of Appeals for the Third Circuit observed that asbestos litigation had already become "an unparalleled situation in American tort law." *In re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The large majority of cases filed to date involve individuals with little, if any, significant impairment as a result of their alleged asbestos-related conditions. The decision below threatens to expand vastly this unprecedented and complex litigation by permitting claims, based on asbestos exposure alone, for negligent infliction of emotional distress and medical monitoring without even the pretext of underlying physical injury. The rule announced by the Second Circuit would give millions of individuals who lack *any* asbestos-related physical condition, but who can claim levels of asbestos exposure at least as great as respondent's, the right to bring actions based on that exposure. Lawsuits by only a fraction of these individuals could devastate defendants and the courts and imperil the funds available to compensate those asbestos-exposed individuals who develop actual disease.

This outcome would be legally unjustified, as well as practically imprudent. As this Court noted in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), it is just such "unpredictable and nearly infinite liability" for emotional distress claims that led to the development of common law restrictions on "the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover." *Id.* at 2408. By ignoring these well-established limitations, the Second Circuit's decision

threatens to expand what is already the largest litigation American courts have ever faced into an essentially limitless number of inherently subjective claims for non-physical injury.

The decision below is equally misguided with respect to claims for medical monitoring for asbestos-exposed individuals. The overwhelming consensus of medical and scientific opinion is that such monitoring is simply not beneficial. Thus, in addition to swamping the courts and sapping the assets of asbestos defendants, the new medical monitoring right announced by the Second Circuit will do plaintiffs very little, if any, good.

ARGUMENT

I. BY PERMITTING CLAIMS BASED ON EXPOSURE ONLY, THE SECOND CIRCUIT HAS ADOPTED A RULE THAT THREATENS TO PRODUCE A VAST AND UNWARRANTED EXPANSION OF ASBESTOS LITIGATION

Owens Corning is the largest solvent defendant in the asbestos personal injury litigation, having received well over 300,000 asbestos clams. Owens Corning respectfully submits this brief as *amicus curiae* to share with the Court information concerning the scope and character of the present litigation and the potential impact on the courts and present litigants of a massive new wave of lawsuits, based on asbestos exposure alone, by plaintiffs who do not suffer any actual physical injury.

A. Magnitude and Character of the Current Asbestos Litigation

It has become a truism that the asbestos litigation is unprecedented, its like not to be encouraged cavalierly.[1] Hundreds of thousands of asbestos personal injury claims have been filed, with a majority of those claims still pending. Yet relatively few of even these current plaintiffs suffer any significant physical limitations, with the serious claims being far out numbered by pleural plaque and other non-malignancy cases.

In 1991, the Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by the Chief Justice, warned that the "problems confronting the courts of this nation" related to asbestos death and disease claims had "reached critical dimensions" and were "getting worse." REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 1-2 (1991) [hereinafter "JUDICIAL CONFERENCE REPORT"]. "What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." *Id.* at 2.[2]

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1. In discussing the tobacco litigation, the Fifth Circuit recently observed that "[n]ot every mass tort is asbestos, and not every mass tort will result in the same judicial crises." *Castano v. American Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996). Significantly, the court added that even the asbestos litigation disaster might have been avoided by more "stringent" judicial "'gate keeping'" and the dismissal of "weak and frivolous claims." *Id.* at 747 n.24 (citing various authorities).

2. Similar observations have been made by a number of courts. *See, e.g., Racich v. Celotex Corp.*, 887 F.2d 393, 394 (2d Cir. 1989); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1335-36 (5th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1022 (1986); *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 525 (Fla. Dist. Ct. App. 1985), *rev. denied*, 492 So. 2d 1331 (1986).

Since the JUDICIAL CONFERENCE REPORT was issued, the asbestos litigation crisis has indeed gotten worse. Well over half of the 330,000 total claims received by Owens Corning throughout the quarter-century history of the asbestos litigation — nearly 190,000 — were received since 1991. Owens Corning is not alone in this regard. Staggering numbers of new asbestos claims continue to be filed against numerous other former manufacturers or distributors of asbestos-containing products as well. *See, e.g.*, MEALEY'S LITIG. REP.: ASBESTOS, Aug. 16, 1996, at 21-23 (describing numbers of asbestos claims disclosed in the annual reports of Owens Corning, Fibreboard Corporation, USG Corporation, Owens-Illinois Inc., W.R. Grace & Co., Pfizer Inc. and other defendants).

Only a relatively small minority of the current lawsuits involve serious injuries. In particular, just a fraction of the cases involve severe asbestosis or asbestos-related malignancies such as lung cancer or mesothelioma. Far greater numbers involve mild asbestosis or conditions such as pleural plaques or pleural thickening. These pleural changes involve a thickening or calcification of the pleural tissue surrounding the lung but are associated with little if any actual impairment. For instance, United States District Judge Charles Weiner, who oversees the federal asbestos multidistrict proceedings, noted recently that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions," but they "are prone to be lost in the shuffle with pleural and other non-malignancy cases." *In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996); *see also In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring."); Peter H. Schuck, *The Worst Should Go First:*

Deferral Registries in Asbestos Litigation, 15 HARV. J.L. & PUB. POL'Y 541 (1992).[3]

Significantly, in the context of both the present litigation and the Second Circuit rule in this case, the current non-malignancy cases are diagnosed largely by such signs as "subjective declarations of shortness of breath, tiredness and general lassitude," rather than objectively observable clinical findings. *Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1566. The diagnostic tests available — *e.g.*, x-ray readings and pulmonary testing — can also be subjective in nature. "Even many forms of pulmonary analysis are not definitive in measuring impairment." *Id.* As such, these claims are inherently susceptible to diagnostic bias and even outright fraud. Recently, Owens Corning filed suit in the Eastern District of Louisiana charging various medical screening laboratories with fraud and RICO violations in connection with an alleged scheme to fake medical test results in order to substantiate asbestos claims. *See Owens Corning v. Pitts*, No. 96-2095 (E.D. La.); *see also Raymark Indus., Inc. v. Stemple*, 714 F. Supp. 460 (D. Kan. 1988) (earlier RICO action by asbestos manufacturing defendant against plaintiffs' attorneys and physicians); *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710 (D. Kan. May 30, 1990) (same).

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3. As Judge Jack Weinstein has pointed out, large numbers of claims by plaintiffs without serious injury are often generated as a result of mass, "assembly-line" medical screening programs:

> [Some attorneys] have filed all of their cases without regard to the extent of injury. In conjunction with unions they have arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque.

In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 748 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on rehearing*, 993 F.2d 7 (2d Cir. 1993).

Beyond the possibility of fraud, many courts and commentators have worried that these less serious cases inappropriately consume judicial and financial resources that might be applied to more serious cases. Without doubt, the huge numbers of such cases have contributed to the long delays that have marked the asbestos litigation. *See, e.g., Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 335 (E.D. Pa. 1994) ("The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease."), *vacated*, 83 F.3d 610 (3d Cir.), *cert. granted*, 117 S. Ct. 379 (1996). In order to cope with this problem, Judge Weiner has established procedures, applicable to the federal multidistrict proceedings, to "prioritize[] malignancies and other serious disease cases." *Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, at *1. A number of other courts have established inactive or "suspense" dockets which defer handling of pleural plaque cases, subject to return to the general docket should the plaintiffs develop a more serious asbestos-related disease. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, Civ. A. No. 2 MDL 875, 1996 WL 239863, at *3 (E.D. Pa. May 2, 1996) (citing pleural registries in Illinois, Maryland, Connecticut, Arizona and Hawaii). These approaches are far from universal, however, and tens of thousands of pleural cases remain on the regular dockets of many jurisdictions.

Clearly, the costs associated with these huge numbers of lawsuits have been staggering. According to one estimate, the total costs to all asbestos defendants as of 1991 (*before* the large wave of recent lawsuits) approximated $7 billion, with the final figures then projected to reach $50 to $100 billion. Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 75, 79. At least 17 such companies have sought bankruptcy protection due to this deluge of asbestos-related personal injury litigation. *See* Ronald L. Motley & Joseph F. Rice, *The* Carlough *Settlement -- Blueprint for a Sane Resolution to the Asbestos Problem*, MEALEY'S LITIG. REP.: ASBESTOS, July 2, 1993, at 24, 25 ("[S]eventeen (17) former asbestos defendants — representing one-half to three-quarters of the original liability share — have gone into bankruptcy.").

These bankrupt companies collectively constitute well over 50 percent of the historical liability in asbestos personal injury cases. *Id.; see also Findley*, 129 B.R. at 747. If possible, the consequences for individual plaintiffs and the court system itself have been even more alarming. Bloated court dockets have made long pre-trial delays increasingly "routine," while the continuing exhaustion of defendants' assets has raised a real prospect that "future claimants may lose altogether." JUDICIAL CONFERENCE REPORT, *supra*, at 3; *see also Findley*, 129 B.R. at 746-47, 750-51, 812 (describing backlog of asbestos personal injury cases).

Leaving aside the issues raised by the decision below, there is no clear end in sight to these claims. Use of asbestos-containing products continued in significant amounts until at least 1974, with some kinds of exposure (*e.g.*, building demolition and asbestos removal) continuing to the present day. With latency periods for asbestos-related illnesses ranging from 15 to 40 years, actual disease claims are likely to continue at peak levels for at least another twenty years. *See* Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1973-74 (1992).[4] Moreover, with few meaningful limitations on the ability to sue, it can also be expected that pleural plaque and other non-malignancy cases will continue to far outnumber the claims of plaintiffs with serious illness.

Unlike respondent here, however, even pleural plaque plaintiffs invariably assert the existence of some *present* asbestos-related physical condition, and they often claim at least some level of actual impairment. *See, e.g., Simmons v. Pacor, Inc.*,

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4. As was noted in the JUDICIAL CONFERENCE REPORT, "predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015." JUDICIAL CONFERENCE REPORT, *supra*, at 2. Some experts believe that the total number of deaths will reach a half million, with projections of total morbidity many times the mortality figure. *Findley*, 129 B.R. at 737 (citing I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES (1981)).

674 A.2d 232, 236 (Pa. 1996) (plaintiffs "contend that the scarring of their lung tissue caused by occupational asbestos exposure, as evidenced by their chest x-rays, is sufficient to establish an ascertainable and physically objective injury"; pleural conditions asserted to be "medically significant diseases that will never improve, and may worsen"); *Georgine*, 157 F.R.D. at 272 (citing views of experts for objectors to class settlement claiming that "individuals with pleural changes alone can have functional impairment").

B. Approval of Exposure-Only Asbestos Claims Would Wreak Havoc on the Courts and Remaining Solvent Defendants

The present situation does not begin to compare to the potential scope of a litigation for claims of emotional distress, based on mere asbestos exposure, which would raise "the specter of unlimited and unpredictable liability." *Gottshall*, 114 S. Ct. at 2411. As the Court recognized in *Gottshall*, it was in order to prevent such unlimited liability that courts traditionally "placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." *Id.* at 2405.

Indeed, the prospect of virtually boundless liability was recognized by the Third Circuit in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), in rejecting asbestos exposure claims under FELA absent any present physical injury:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

Id. at 942; *see also Amendola v. Kansas City S. Ry. Co.*, 699 F. Supp. 1401, 1407-11 (W.D. Mo. 1988) (suggesting that "floodgates" would open were the court to permit claims under FELA based on asbestos exposure without present physical injury); *Batko v. Ogilvie*, No. 85 C 7873, 1986 WL 5761 (N.D. Ill. May 9, 1986) (following *Schweitzer*).

Respondent is clearly aware of the potential impact of a rule permitting claims based on mere asbestos exposure. In opposing *certiorari*, respondent attempted to minimize this probability, arguing that the rule adopted by the Second Circuit would apply in only a tiny number of FELA cases in which there had been "massive, lengthy and tangible" asbestos exposure. Respondent's Brief in Opposition at 5 (quoting *Buckley v. Metro-North Commuter R.R.*, 79 F.3d 1337, 1345 (2d Cir. 1996)). This is no more than wishful thinking. Rather, there is no reason that the rule adopted by the Second Circuit, if approved by this Court, would be limited to the FELA context or to the facts of respondent's case.

1. The Impact of This Court's Ruling Will Extend Far Beyond FELA Cases

Respondent says the rule enunciated by the Second Circuit will be limited to plaintiffs with unusual exposure under FELA. But the vast majority of asbestos personal injury claims are brought not against FELA employers but rather against former manufacturers or distributors of asbestos-containing products in tort.[5] FELA does not exist in a vacuum. As the Court stressed in *Gottshall*, FELA was intended, with the exception of certain "explicit statutory alterations," 114 S. Ct. at 2404, to embody "'common-law concepts of negligence and

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5. In addition, there are a significant number of maritime asbestos actions brought against both shipowners and manufacturing defendants under the Jones Act. Because the Jones Act incorporates the operative provisions of FELA, *see* 46 U.S.C. app. § 688(a), any ruling in this case will immediately be applied to these maritime cases.

injury.'" *Id.* (quoting *Urie v. Thompson*, 337 U.S. 163, 182 (1949)). FELA asbestos decisions necessarily look towards tort litigation principles. Similarly, any ruling from this Court concerning the viability of a cause of action based on mere asbestos exposure under FELA will have enormous consequences for the reception of such claims under the common law. Indeed, in spite of the fact that medical monitoring claims have previously been rejected in asbestos litigation, since the Second Circuit decision in this case, Owens Corning and other asbestos manufacturing defendants have been named in a spate of purported "medical monitoring" class actions on behalf of completely healthy individuals who have allegedly been exposed to asbestos-containing products. *See, e.g., Damaris v. ACandS, Inc.*, No. 47-242 (18th Jud. Dist. La.); *Howard v. ACandS, Inc.*, No. 96-C-350 (Cir. Ct. Kanawha County, W. Va.); *Butler v. Owens-Corning Corp.*, No. 02721 (Ct. C.P. Phil. County, Pa.). Rightly or wrongly, affirmance of the Second Circuit's decision undoubtedly would be viewed as giving the green light for the filing of a huge number of similar lawsuits.[6]

2. The Facts of Respondent's Case Provide No Limiting Principle

Respondent relies heavily on the unusual extent and duration of Mr. Buckley's asbestos exposure for the time period in which it occurred (*i.e.* the mid-1980s). By that time, however, millions of Americans had already experienced similar levels of asbestos exposure. One commonly cited estimate for the population that has experienced significant occupational exposure to asbestos is 21 million individuals. *See, e.g., Jackson*, 750 F.2d at 1337 (citing I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES (1981)).

6. The Third Circuit's *Schweitzer* decision rejecting such a cause of action has been cited in numerous common law cases considering similar claims. *See, e.g., Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 543 (Me. 1986); *Giffear v. Johns-Manville Corp.*, 429 Pa. Super. 327, 632 A.2d 880, 886 (Super. Ct. 1993), *aff'd sub nom. Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *Hawaii Fed. Asbestos Cases*, 734 F. Supp. at 1567 n.8.

Indeed, the ultimate figure may be higher. Over the years, asbestos was used in some "3000 different products," *Wyatt v. A-Best Prods. Co.*, 924 S.W.2d 98, 106 (Tenn. Ct. App. 1995), including "tooth brushes, ironing board covers, brake linings, roofing shingles, fireproofing and insulating material." *Id.; see also Findley*, 129 B.R. at 736 (surveying the "multitude of applications" of asbestos-containing products).

Respondent's contention that exposure to substantial levels of asbestos dust is relatively rare in the 1980s or 1990s simply misses the point. Because of the long latency period of asbestos-related conditions,[7] there are presently living many millions of individuals who experienced such exposure in the past who presumably would be able to assert claims *today* for emotional distress and medical monitoring under the rule adopted by the Second Circuit. If even a small fraction of these individuals were to seek recovery for emotional distress or medical monitoring — or have such recovery sought on their "behalf" via purported class actions — the effects on the court system and the remaining solvent defendants could be catastrophic. *See Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) ("There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants. . . . Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic]

7. *See, e.g.*, Ad Hoc Committee of the Scientific Assembly on Environmental and Occupational Health, American Thoracic Society, *The Diagnosis of Non-Malignant Diseases Related to Asbestos*, 134 AM. REV. RESPIR. DIS. 363, 365 (1986) (adopted as the official statement of the American Thoracic Society in March 1986).

being remediless."), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).[8]

Indeed, respondent's own asbestos exposure, which was limited to three years, is far less significant than the exposure claimed by most plaintiffs — many of whom worked at jobs involving close contact with asbestos-containing products *over many decades*. *See, e.g., Racich*, 887 F.2d at 394 (plaintiff had been "exposed to asbestos products for almost his entire adult life, from 1923 to 1974"); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973) (plaintiff exposed to asbestos-containing products over a 33-year period), *cert. denied*, 419 U.S. 869 (1974).[9] In that regard, respondent's repeated use

8. Because of its wide use, and because asbestos is a naturally occurring substance, it would be unusual for an urban American *not* to have been exposed to asbestos fibers. According to the scientific literature, most urban dwellers' lungs contain hundreds of thousands or millions of asbestos fibers per gram of dry lung tissue. *See*, Andrew Churg, *Nonneoplastic Diseases Caused By Asbestos*, *in* PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 213, 219, 224-29 (Andrew Churg & Francis H.Y. Green eds., 1988); J.C. Wagner et al., *Correlation Between Fibre Content of the Lung and Disease in East London Asbestos Factory Workers*, 45 BRIT. J. INDUS. MED. 305-08 (1988). Despite the Second Circuit's reference to Mr. Buckley's "massive exposure" to asbestos dust, it is difficult to see why the court's novel version of the "physical impact" test would not permit claims by any plaintiffs who can demonstrate that they have inhaled asbestos fibers. Of course, even if the scope of "exposure only" asbestos litigation could somehow be confined to workplace exposure cases, the pool of potential plaintiffs would be enormous.

9. *See also Carel v. Fibreboard Corp.*, No. 94-5222, 1996 U.S. App. LEXIS 136, at * 2 (10th Cir. Jan. 4, 1996) (worker exposed to asbestos for 33 years; worker's wife exposed to asbestos dust from his clothes for 27 years); *Barnes v. Keene Corp.*, 67 F.3d 626, 627 (7th Cir. 1995) (plaintiff's husband "exposed to numerous asbestos products in the work place during the 43 years of his working life"); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 751 (1st Cir. 1992) (claimant (continued...)

of the term, "the Snowmen of Grand Central Terminal," merely underscores the similarity of his situation and those of millions of others who were exposed to asbestos. Since the asbestos personal injury litigation began, plaintiffs have described levels of asbestos dust in their workplaces in nearly identical terms. *See, e.g., Smith v. ACandS, Inc.*, 31 Cal. App. 4th 77, 86, 37 Cal. Rptr. 2d 457, 461 (Ct. App. 1994) (asbestos insulator testified that there was so much asbestos dust at plaintiff's work-site that "one looked 'like a snowman'"); *Owens-Illinois v. Armstrong*, 87 Md. App. 699, 722, 591 A.2d 544, 554-55 (1991) (asbestos dust "would fly like snowflakes"; dust "was on your arms, on your clothes, in your nose and your eyebrows and mustache"), *aff'd in part, rev'd in part*, 326 Md. 107, 604 A.2d 47, *cert. denied*, 506 U.S. 871 (1992); *Goss v. American Cyanamid Co.*, 278 N.J. Super. 227, 233, 650 A.2d 1001, 1003 (Super. Ct. App. Div. 1994) (asbestos insulator would be covered with white dust so that he "'looked like a snowman'"); *Owens-Corning Fiberglas Corp. v. Garrett*, 343 Md. 500, 510, 682 A.2d 1143, 1147 (1996) (asbestos dust "would make you look like a snowman").[10]

9. (...continued)
alleged exposure to asbestos at work from 1941 until 1985); *Neal v. Carey Canadian Mines, Ltd.* 548 F. Supp. 357, 365-66 (E.D. Pa. 1982) (claims of fifteen workers exposed to asbestos up to 36 years), *aff'd sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985); *Simmons*, 543 Pa. at 667, 674 A.2d at 233 (plaintiff Simmons exposed to asbestos from 1943 through 1974); *Wilder v. Amatex Corp.*, 314 N.C. 550, 552, 336 S.E.2d 66, 68 (1985) (plaintiff exposed to asbestos for 41 years); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 164, 421 N.E.2d 864, 865 (1981) (worker exposed to asbestos for 29 years).

10. *See also Peek v. SKW/Clinton*, 855 P.2d 415, 419 (Alaska 1993) (plaintiff's co-workers testified "that asbestos was 'like snow' in the air on several jobs"); *Lineaweaver v. Plant Insulation Co.*, 31 Cal. App. 4th 1409, 1420, 37 Cal. Rptr. 2d 902, 909 (Ct. App. 1995) (plaintiff exposed to friable asbestos that "created visible dust reminiscent of a 'snow storm'"); *United States Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 639, 643 N.E.2d 1226, 1252 (App. Ct. 1994) (so much asbestos "was released on (continued...)

Respondent and the Second Circuit also ignore the fact that, while asbestos use has dropped dramatically since the mid-1970s, people involved in building demolition or renovation work and asbestos removal may be similarly exposed today.[11] Whether it was prudent in 1985 to allow asbestos exposure such as that alleged by respondent is not at issue here. The question is whether the "injury" allegedly suffered suffices under FELA (or the common law) to state a cause of action.

There simply is no legally sufficient basis for so holding. Permitting claims based only on exposure and an allegation of emotional distress, especially as broadly construed by the Second Circuit, would be inconsistent with settled law. As this Court recognized in *Gottshall*, emotional distress claims are inherently subjective, and by their nature susceptible to being "imagined or falsified." *Gottshall*, 114 S. Ct. at 2405 (quoting *Maloney v. Conroy*, 208 Conn. 392, 397-98, 545 A.2d 1059, 1061 (1988)). There are "no necessary finite limits" on the number of persons who might claim emotional injury, and the "incidence and severity" of such claims is dependent upon a range of "psychological factors" that are often not objectively discernible. *Id.* It was in order to cabin the otherwise potentially boundless liability for emotional distress claims that courts imposed the

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10. (...continued)
a daily basis that it looked like it had been snowing indoors each day"), *app. denied*, 161 Ill. 2d 542, 649 N.E.2d 426 (1995); *ACandS, Inc. v. Asner*, 104 Md. App. 608, 654, 657 A.2d 379, 402 (1995) (insulators regularly "caused 'asbestos snow storms'" installing asbestos-containing products), *rev'd*, 1996 WL 583438 (Md. Oct. 11, 1996); *Dafler v. Raymark Indus., Inc.*, 259 N.J. Super. 17, 24, 611 A.2d 136, 140 (Super. Ct. App. Div. 1992) ("pipefitters' use of . . . asbestos products created dust to the extent that 'it seemed like a snowstorm'"), *aff'd*, 132 N.J. 96, 622 A.2d 1305 (1993).

11. *See* W. KEITH C. MORGAN & ANTHONY SEATON, OCCUPATIONAL LUNG DISEASES 315 (3d ed. 1995); W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 416 (3d ed. 1994).

limitations on such claims that the Second Circuit has ignored in this case.[12]

By permitting recovery based only on an amorphous claim of some "emotional" distress, coupled with an equally undefined level of "physical" exposure, the Second Circuit has created an unworkable and ultimately meaningless test. In *Gottshall*, this Court expressly rejected such "highly subjective," "fact-specific" tests as providing no reliable limitations on emotional distress claims. 114 S. Ct. at 2409. In order to avoid the "unpredictable and nearly infinite liability" condemned in *Gottshall*, the Second Circuit's decision must be reversed.

II. THE DECISION BELOW IMPROPERLY CREATES A NEW MEDICAL MONITORING RIGHT FOR A VAST ASBESTOS-EXPOSED POPULATION DESPITE AN OVERWHELMING CONSENSUS THAT THERE IS NO BENEFIT FROM SUCH MONITORING

Perhaps more alarming than the Second Circuit's dramatic loosening of traditional common law requirements for emotional distress claims is the court's almost backhand

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12. These limitations, which are discussed at length by petitioner, include, in addition to the zone of danger test itself, that (i) the plaintiff's emotional distress must result in some physical manifestation, *see Plummer v. Abbott Labs.*, 568 F. Supp. 920, 926-27 (D.R.I. 1983) (citing "overwhelming weight of authority across the nation"); (ii) the plaintiff's emotional distress must be "severe," *see Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 566-67 n.13 (1987); and (iii) the plaintiff's emotional distress must be medically diagnosable and medically significant, *see Aurora v. Burlington N. R.R.*, 31 F.3d 724, 726 (8th Cir. 1994).

Here, it is undisputed that Mr. Buckley does not suffer any physical manifestation of his emotional distress and has never sought psychiatric treatment or seen a counselor. (J.A. at 519-20.) On the contrary, plaintiff's own expert testified that any concern displayed by Mr. Buckley did not rise to a level warranting counseling. (J.A. at 205-06.)

acceptance of a claim for "medical monitoring" which would seemingly be available to any one of the millions of Americans who can claim asbestos exposure similar to respondent's.

As if permitting such a claim were of no particular moment, the Second Circuit called it "hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred as a result of an injury." *Buckley*, 79 F.3d at 1347 (citing CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 90 (1935)). However, it is precisely the requirement of any actual "injury" from which such expenses might result that the Second Circuit abandoned in this case.

It is true that a few courts have approved recovery for medical surveillance absent present injury. Even these courts, however, have typically done so in fairly limited situations involving the claims of a small group of people with the same exposure — not claims of individual exposure to widely disseminated substances in hundreds of thousands of disparate worksites. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 832 (3d Cir. 1990) (38 persons who either worked in or lived adjacent to PCB-contaminated railroad yard), *cert. denied*, 499 U.S. 961 (1991); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 975, 863 P.2d 795, 801, 25 Cal. Rptr. 2d 550, 556 (1993) (four landowners living next to a toxic landfill); *Ayers v. Township of Jackson*, 106 N.J. 557, 565, 525 A.2d 287, 291 (1987) (339 residents whose well water was contaminated by toxic pollutants leaching into an aquifer).

The medical monitoring right announced by the Second Circuit has far broader ramifications. Were *Buckley* applied outside the FELA context, *see supra* Part I.B.1, it would establish a right to periodic medical screenings for many millions of individuals, all to be paid for by defendants in mass tort litigation which are struggling to pay claims by hundreds of thousands of plaintiffs who claim injury now.

In fact, several courts in the asbestos context have refused to permit exposed persons to recover for medical surveillance,

absent an existing asbestos-related physical condition. *See Theer v. Philip Carey Co.*, 133 N.J. 610, 627-28, 628 A.2d 724, 733 (1993); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Fried v. Sungard Recovery Servs.*, 925 F. Supp. 375, 376-77 (E.D. Pa. 1996). Even the New Jersey Supreme Court, the same state court that approved a medical monitoring claim in *Ayers*, imposed the requirement of a present asbestos-related condition in response to the argument that to hold otherwise would "open the floodgates" to exposure-only litigants. *Theer*, 133 N.J. at 625, 628 A.2d at 732.

Strong policy grounds exist for exercising great caution before expanding recovery for medical monitoring in the context of asbestos exposure. Any time courts are called upon to make what are essentially medical care decisions, they venture into an area in which their competence is necessarily limited. *See, e.g., Glick v. Henderson*, 855 F.2d 536, 539 (8th Cir. 1988) (courts are "hardly suited" for the task of "dictat[ing] medical guidelines"); *Sosa v. Board of Managers*, 437 F.2d 173, 177 (5th Cir. 1971) ("Courts must not attempt to take on the escutcheon of Caduceus."). Here, the Second Circuit enters the managed care business by establishing a broad right to a form of medical treatment which is not accepted by the medical community.

As a matter of logic as well as law, a program of medical monitoring should not be pursued unless there is some significant chance that it will result in a medical *benefit*. *See Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1493 (10th Cir. 1993); *Abuan v. General Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994); *Ayers*, 106 N.J. at 606, 525 A.2d at 312. Here, routine monitoring for early signs of disease is not medically advisable for an asymptomatic, asbestos-exposed population.[13] Rather, the conclusion of such

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13. At trial, essentially the only proof offered in support of respondent's claim that medical monitoring was justified was the bare assertion of one of Mr. Buckley's treating physicians, Dr. Steven Markowitz, that he believed the screening would be beneficial. (J.A. at 92-94.) However, even Dr. (continued...)

authoritative bodies as the American College of Physicians, the United States Preventive Services Task Force, and the Canadian Task Force on Periodic Health Examinations is that screening of asymptomatic people is recommended only in narrow circumstances.[14] This conclusion has been reached following detailed studies designed to determine whether specific screening tests actually improve patient morbidity and mortality. While certain tests have survived that scrutiny (*e.g.*, mammography for women over fifty and sigmoidoscopy for men over fifty), other popular screening tests have not (*e.g.*, annual physical examinations and periodic chest x-rays).[15]

There is strong medical agreement that screening tests for the early detection of asbestos-related conditions is *not* warranted. With respect to non-malignant conditions, there is little that can be done to prevent the progression of disease that would not be medically recommended regardless of early detection, such as ceasing any ongoing exposure or discontinuing smoking.[16] Moreover, with respect to the rarest and most serious

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13. (...continued)
Markowitz admitted that any medical benefit of screening tests for asbestos-exposed individuals had not been demonstrated in the scientific literature. (J.A. at 164-65.)

14. *See* U.S. PREVENTIVE SERVICES TASK FORCE, GUIDE TO CLINICAL PREVENTIVE SERVICES (2d ed. 1996); Canadian Task Force on the Periodic Health Examination, *The Periodic Health Examination*, 121 CAN. MED. ASSOC. J. 1193 (1979). *See generally*, Robert S.A. Hayward et al., *Preventive Care Guidelines 1991*, 114 ANNALS INTERNAL MED. 758 (1991) (comparing the screening tests recommended by the American College of Physicians, the Canadian Task Force on the Periodic Health Examinations, the United States Preventive Services Task Force, and the American Cancer Society).

15. *See* Hayward, *supra*.

16. *See generally* EDWARD A. GAENSLER ET AL., RADIOGRAPHIC PROGRESSION OF ABSESTOSIS WITH AND WITHOUT CONTINUED EXPOSURE 386-92 (VIIth (continued...)

asbestos-related condition, a malignancy called mesotheolioma, early detection is unfortunately irrelevant because the illness is "invariably fatal." *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 660 n.2, 512 A.2d 466, 475 n.2 (1986).[17]

The inappropriateness of an undifferentiated right to medical monitoring for asbestos-related conditions may best be seen by looking at lung cancer, which can be asbestos-related. Lung cancer can sometimes be treated effectively, particularly by surgery. Because of the possibility of effective treatment, substantial scientific studies have been undertaken concerning the benefits of early screening tests such as periodic x-rays and sputum cultures. However, as a direct result of this research, a strong scientific consensus has emerged *against* such screening, even for high-risk groups.

Beginning in the 1950s, several studies of x-ray screening failed to show any significant benefit from lung cancer screening.[18] More recently, the National Cancer Institute sponsored three large, long-term randomized control trials of lung cancer screening, using both x-rays and cultures, conducted

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16. (...continued)
Int'l Pneumoconioses Conference Pub. No. 90-108, Sept. 1990).

17. *See also* Åke Sandén & Bengt Järvholm, *A Study of Possible Predictors of Mesothelioma in Shipyard Workers Exposed to Asbestos*, 33 J. OCCUPATIONAL MED. 770 (1991) (medical monitoring would be of little value identifying persons with a high risk of mesothelioma).

18. *See, e.g.*, Gary D. Friedman, *Effects of MHTS on Patients*, *in* MULTIPHASIC HEALTH TESTING SERVICES 538-45 (Morris F. Collen ed., 1978); Katharine R. Boucot & William Weiss, *Is Curable Lung Cancer Detected by Semiannual Screening?* 224 JAMA 1361 (1973); A. Lilienfeld et al., *An Evaluation of Radiologic and Cytologic Screening for the Early Detection of Lung Cancer: A Cooperative Pilot Study of the American Cancer Society and the Veterans Administration*, 26 CANCER RES. 2083 (1966).

by the Mayo Clinic,[19] Johns Hopkins University,[20] and Memorial Sloan-Kettering Hospital.[21] The results of these trials, and similar European studies conducted during approximately the same time period, have been analyzed and discussed in great detail in the scientific literature:

> Four recent controlled trials and one case-control study failed . . . to show that screening reduces lung cancer mortality even in high-risk persons (smokers). In the Mayo Lung Project, for example, the lung cancer death rate in high-risk men offered sputum cytology and chest roentgenogram every 4 months was 3.1 per 1000 person-years, compared with 3.0 per 1000 person-years in a control group. Chest roentgenograms and sputum cytology lead to false-positive test results in smokers of approximately 5% and 0.5%, respectively. *Because of the lack of evidence of benefit and because of its potential harms and costs, screening for lung cancer is not recommended.*

David M. Eddy, *Screening for Lung Cancer*, 111 ANNALS INTERNAL MED. 232, 232 (1989) (Introduction) (emphasis added).[22]

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19. Robert S. Fontana et al., *Lung Cancer Screening: The Mayo Program*, 28 J. OCCUPATIONAL MED. 746 (1986).

20. John K. Frost et al., *Early Lung Cancer Detection: Results of the Initial (Prevalence) Radiologic and Cytologic Screening in the Johns Hopkins Study*, 130 AM. REV. RESPIR. DIS. 549 (1984).

21. *Early Lung Cancer Detection: Summary and Conclusions*, 130 AM. REV. RESPIR. DIS. 565 (1984).

22. *See also* John C. Ruckdeschel, *Whither Screening for Lung Cancer?*, J. NAT'L CANCER INST. 78 (1988); D.R. Sanderson & J.R. Jett, *Lung Cancer: The American View*, 2 EURO. RESPIR. J. 1002 (1989).

The results of this research led to the abandonment of the American Cancer Society's recommendation for annual chest x-rays for asymptomatic individuals, even in high-risk groups such as smokers.[23] Similarly, the American Academy of Family Physicians, the American College of Radiology, the American Thoracic Society, the American College of Physicians, and the Canadian Task Force on Periodic Health Examination have *all* issued recommendations against routine screening of asymptomatic individuals for lung cancer.[24]

The same position has been taken by the United States Preventive Services Task Force in its GUIDE TO CLINICAL PREVENTIVE SERVICES. In publishing the GUIDE, the Task Force coordinates the input of a large variety of governmental agencies in the health care area, including the Centers for Disease Control and Prevention, the Public Health Service, the Food and Drug Administration, and the National Institutes of Health, as well as a large number of private health care organizations and agencies. As such, the GUIDE probably comes as close to expressing a consensus view regarding preventive services as any one publication could. *See* Lee Radford, *Medical Monitoring Claims: A Review of the Guide to Clinical Preventive Services*, TOXICS L. REP., Apr. 10, 1996, at 1302. Citing the published scientific literature, as well as the unanimous view of medical and scientific organizations, the GUIDE flatly recommends against periodic lung cancer screening. *See* GUIDE TO CLINICAL PREVENTIVE SERVICES, *supra*, at 135-39.[25]

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23. Ruckdeschel, *supra*, at 78.

24. *See* GUIDE TO CLINICAL PREVENTIVE SERVICES, *supra*, at 137 & nn. 26-31; AMERICAN ACADEMY OF FAMILY PHYSICIANS, SUMMARY OF POLICY RECOMMENDATIONS FOR PERIODIC HEALTH EXAMINATIONS 14 (1996).

25. Notably, the GUIDE does recognize the benefits of early detection of colorectal cancer, another malignancy that is sometimes claimed to be caused by asbestos exposure. However, the GUIDE recommends annual fecal occult blood tests and/or sigmoidoscopy for *all* men over fifty years

(continued...)

In light of this widespread agreement in the medical and scientific communities that medical monitoring for asbestos-exposed individuals is not beneficial, the Second Circuit's creation of a legal right to sue for the costs of such monitoring is particularly troubling. Even apart from the impact on an already problematic litigation, the science shows that recovery would do plaintiffs little if any good. Clearly, before the courts of this country embark on the kind of massive exercise in redistribution of funds entailed by litigation-financed screening tests for millions of individuals, some more solid basis in science and medicine would seem to be required.[26]

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25. (...continued)
of age to detect colorectal cancers. Guide to Clinical Preventive Services, *supra*, at 89-103. No additional testing for such malignancies is prescribed based on a history of asbestos exposure. Because any asbestos plaintiff over the age of fifty should in any event undergo annual screening tests for colorectal cancer, even the Second Circuit's decision would not permit the recovery of the costs associated with these tests. *See Buckley*, 79 F.3d at 1347 (recovery limited to "a monitoring regime different than the one that would have been prescribed in the absence of [asbestos] exposure").

26. Moreover, permitting recovery for the future costs of periodic screening tests does not guarantee that the tests will actually occur. At present, workers and retirees in many asbestos-exposed occupations already have access to periodic screening tests under insurance or union health plans. The fact that only relatively few individuals take advantage of such testing now suggests that many others have simply decided that whatever benefits exist do not outweigh the inconvenience, discomfort and even risk involved in such tests. *Cf.* George W.C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 255-56 (1993).

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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December 16, 1996

FILED
JAN 14 1997
CLERK

No. 96-320

In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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QUESTIONS PRESENTED

Amici shall address the following questions:

1. Whether on the specific facts of this case, the Second Circuit was correct in its finding that Michael Buckley's daily, unprotected exposure to asbestos fibers satisfied the traditional "physical impact" test as well as *Gottshall's* "zone of danger" test?

2. Whether the Second Circuit was correct in its ruling that the Federal Employers' Liability Act ("FELA") permits Michael Buckley to recover the quantifiable cost of periodic medical monitoring made necessary by toxic exposure caused solely by Metro-North's negligent workplace practices?

3. Whether Metro-North's argument that medical monitoring poses problems of claim-splitting is timely and if properly before this Court, does FELA's statutory goal require Michael Buckley to choose between reasonable and necessary medical surveillance treatment now or help later?

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INTEREST OF AMICI CURIAE**

Amici curiae, the International Association of Machinists and Aerospace Workers ("IAM") and Brotherhood of Maintenance of Way Employes, represent approximately half a million members who work in diverse settings including the aerospace, manufacturing, railroad, transportation, wood-working and shipbuilding and repair industries. The IAM has a great interest in full and fair recovery for workers who have been injured by toxic exposures caused by the employer's failure to furnish employees with a safe place to work. The IAM submits that if wrongdoers are not deterred for latent, occupational injuries they cause, they will have no incentive to fulfill their duty to provide a safe workplace. The Federal Employers Liability Act imposes the costs of occupational illnesses on the railroad which creates incentives for optimal safety.

Congress enacted FELA to "protect the lives and persons of employees, by securing a more careful selection of employees, a closer supervision of them and a more rigid supervision of their duties." M.G. Roberts, 2 Federal Liabilities of Carriers §704 at 1315 (2d ed. 1929). This is good public policy. Metro-North and its amici ask this Court to do more than decide this federal railroad worker's compensation case. Metro-North contends that for this Court to reverse the Second Circuit would "advance...important policy concerns affecting the nation's courts, individual litigants, businesses and the public at large." Pet. Br. 7-8. Principles of federalism and judicial restraint dictate that this Court confine itself to evaluating the case below in the context of FELA's remedial purpose rather than federalizing state tort law.

** Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

This lawsuit arises under the Federal Employers' Liability Act (FELA) which places "on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations." *Wilkerson v. McCarthy, 336 U.S. 53, 68 (1948)* (Douglas, J., concurring). The Second Circuit found medical monitoring to be a reasonably necessary medical cost that should be assigned to the wrongdoer, rather than the injured worker. Medical monitoring deters misconduct and provides just compensation to the victims of employer negligence.

The IAM submits that medical monitoring is a positive development where the early detection and treatment of occupational diseases is possible and beneficial as in this case. The IAM has a great interest in workers obtaining full and fair recovery for all of the harm caused by an employer's reckless indifference to safety. This brief will show the Court that the Second Circuit's decision should be upheld because it is rooted in traditional tort law as well as FELA's distinctive statutory purpose in injury compensation. Amici respectfully submits this brief in support of petitioner to assist the Court in developing FELA rules that construe common law doctrines flexibly in order to accommodate FELA to changing occupational injuries, conditions, and hazards.

STATEMENT OF THE CASE

Metro-North ignores the record in this case when it portrays Michael Buckley as being in no different position than the millions of other Americans who have been merely exposed to asbestos. Michael Buckley worked for Metro-North as a pipe fitter, repairing pipes in the steam tunnels of Grand Central Station. Michael and his co-workers were dubbed the "Snowmen of Grand Central Station" because each workday they "would emerge from their daily duties in the tunnels covered head to toe with white powder." *Buckley v.*

Metro-North Commuter Railroad, 79 F.3d 1337, 1340 (2d Cir. 1996).

In 1985 when Michael Buckley began working in the steam tunnels he received no warning, instruction or protective equipment to prevent the inhalation and ingestion of asbestos fibers. *Id.* After August of 1987 Metro-North acknowledged the asbestos hazard by providing rudimentary asbestos instruction, ill-fitting "half-face respirators," and plastic glove bags to contain the asbestos dust. *Id.* The plastic bags "melted on the hot pipes after the insulation was removed, spilling out" white dust containing asbestos fibers. *Id.*

Metro-North argues that the massive, unprotected exposure of asbestos that Michael Buckley and his co-workers endured, does not constitute compensable harm under the Federal Employers Liability Act ("FELA"). Metro-North and its amici seek to take away the right of the injured railroad worker to full and fair compensation for medical expenses necessitated solely by employer negligence.

SUMMARY OF ARGUMENT

I. Metro-North's description of this case as a mere asbestos exposure case no different than that experienced by millions of other Americans ignores the record below and the Second Circuit's analysis. Metro-North and its amici would like this Court to indulge in judicial tort reform by crafting a federal common law based upon the most restrictive precedents that can be found. Metro-North's call for judicial activism to reform state tort law should be rejected by this Court because it undermines the Congressional purpose of providing railroad workers with a fair and full recovery for injuries caused by railroad negligence.

The Second Circuit was correct in finding that Michael Buckley suffered a physical impact due to his massive prolonged exposure to asbestos fibers both on his body and in the tissue of his lungs.

Metro-North's argument is that the Second Circuit misapplied the *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396 (1994) "zone of danger" test. Metro-North wrongly would require physical impact victims to prove more than would be required by traditional tort law: manifested physical injury, severe emotional distress, and an imminent fear of impact. Metro-North and its amici substitute the word "injury" for impact throughout their briefs to persuade this Court to wrongly apply "zone of danger" restrictions on physical impact claimants. Under traditional tort law, physical impact alone satisfies concerns about fraud, proof, and opening floodgates.

Metro-North and its amici are misinterpreting *Gottshall* by arguing that the holding places new restrictions on those direct victims who have sustained a physical impact. This inaccurate reading of *Gottshall* clashes with the Court's statement that "[t]he zone of danger test is consistent with FELA's central focus on physical perils,...[and that] "the rule will further Congress' goal of alleviating the physical dangers of railroading." *Id.* at 2410-11. The only issue decided in *Gottshall* was whether a bystander to the infliction of injury on an unrelated co-worker satisfied the zone of danger standard. In *Gottshall*, this Court did not address, let alone qualify, the traditional physical impact test.

Michael Buckley suffered a legally cognizable physical impact each day when the airborne asbestos fibers settled on his skin and were inhaled and ingested. Traditional tort law has already visited Michael Buckley's scenario of being impacted by a toxic substance. Under the common law, if

dust, smoke or toxic chemicals make contact with the plaintiff, they have suffered a physical impact. The settling of asbestos dust on Michael Buckley's skin, hair, ears, nose, mouth and clothing constituted a physical impact.

The Second Circuit was correct in finding that a reasonable person would have suffered emotional distress from this physical impact. The Second Circuit had a sufficient basis for its finding that Michael Buckley suffered a subclinical injury as well as an impact from asbestos fibers embedded in his lungs. Metro-North knows that Michael Buckley satisfies all of the requirements for negligent infliction of emotional distress under the traditional impact analysis. Given that knowledge, Metro-North urges this Court to apply "zone of danger" restrictions to a situation where there is no problem of a remote bystander suffering unforeseeable distress. Michael Buckley is no Helen Palsgraf. Again, Michael Buckley is an expected physical impact victim injured in an expected manner.

Michael Buckley is a railroad worker who was directly physically impacted by asbestos dust in a classic unsafe workplace. That is not to say that Michael Buckley would necessarily be precluded from recovering if this Court mistakenly applied "zone of danger" restrictions to a physical impact victim. There is little consensus about what qualifiers should be applied to "zone of danger" claimants, contrary to representations made by Metro-North and its amici. The policy reason for qualifiers is to test the genuineness of claims made by "zone of danger" bystanders and indirect victims. Whether Michael Buckley is a direct or indirect victim of asbestos, no reasonable person could consider this to be a fraudulent claim. To insinuate that his emotional distress claim is "suspect," as Metro-North does, disregards the record below.

II. Metro-North seeks to restrict FELA's definition of injury to preclude the victims of toxic exposure from recovering the cost of medical surveillance necessary to detect and treat the onset of asbestos related disease. The Federal Employers Liability Act does not qualify the word injury with adjectives such as "accidental," "immediate," or "physical manifestation". Asbestos related diseases generally have a latency period spanning decades and its victims cannot establish a discernible physical manifestation. FELA's definition of injury is flexible enough to permit reimbursement for the specific cost of periodic examinations to promptly detect and treat asbestos related disease as it develops.

The weight of authority supports medical monitoring in the absence of manifested physical illness where exposure is prolonged to promote the early diagnosis and treatment of disease. Metro-North and its amici argue that this Court needs to apply the most restrictive common law limitations that most other states have rejected. This call for judicial tort reform clashes with FELA's policy of fair and full recovery.

The railroad is the "least cost avoider" in reducing the harm caused by toxic substances in the workplace. It is optimal to deter Metro-North's reckless indifference to safety because its cost savings in exposing untrained and unprotected workers to an asbestos hazard is socially harmful. The railroad's knowledge about the asbestos hazard was superior to regulators as well as the unprotected workers.

Medical monitoring damages is also consistent with the "avoidable consequences" rule and the allowance of medical expense damages under traditional tort law. FELA is a distinctive compensation system for railroad employees, not the general public. Congress made the decision in 1908 to exchange the railroad workers' common law rights which today would include access to the remedy of punitive damages

for full compensation under a uniform, federal common law. Congress did not eliminate the tort concept of deterrence with the *quid pro quo* that exchanged state tort law remedies for FELA recovery. Making the railroad shoulder the responsibility of paying the reasonable costs of medical procedures necessitated by Metro-North's negligence is the only deterrent available in this case.

III. Metro-North procedurally defaulted on its claim-splitting argument in the Second Circuit. Metro-North raises claim-splitting in this appeal for the first time, not out of concern for Michael Buckley's welfare, but for its own advantage. FELA's goal of full and fair compensation should cover Michael's present and future medical expenses. FELA does not compel this Court to make the plaintiff choose between help now and help later. Metro-North argues throughout its brief that Michael Buckley is a "no injury" plaintiff that does not require any compensation for the great harm it has inflicted on Michael Buckley. Metro-North's sincerity in assisting the judiciary in managing latent occupational illness claims is questionable. A FELA claimant is entitled to full recovery for all reasonably necessary medical costs of diagnosing and treating the injuries resulting from the railroad's wrongdoing. This Court adopted the liberal discovery rule 47 years ago in *Urie v. Thompson*, 337 U.S. 163 (1969). Should Michael Buckley develop a full blown asbestos disease, his claim will not be barred by either the statute of limitations nor by the regressive single controversy rule.

ARGUMENT

I. THERE WAS NO NEED FOR THE SECOND CIRCUIT TO UTILIZE THE GOTTSHALL "ZONE OF DANGER" TEST BECAUSE IT HAS NO APPLICATION TO THE FACTS OF THIS CASE.

The Second Circuit had an ample basis for concluding that Michael Buckley was physically impacted and suffered a subclinical injury by daily exposure to asbestos dust over several years. The court noted that asbestos "dust would cover Buckley's skin and clothes and enter his nose and mouth, so that he could taste the chalky insulation material." *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337, 1340 (2d Cir. 1996). Metro-North's implausible argument that this prolonged, massive exposure to asbestos is minimal and non-injurious is ludicrous. Is this Court to believe that the attorneys for Metro-North would tolerate their loved ones having to function for even one hour in such a dangerous situation? The Second Circuit had an ample basis for finding that Michael Buckley suffered a physical impact and was harmed when asbestos dust settled on his skin each workday and was inhaled and ingested.[1] This Court should also take a practical view as to whether the impact occurred by heeding Justice Holmes' advice to examine "the situation as a practical unit, rather than inquire into a purely logical priority." *Union Pac. R. Co. v. Hadley*, 246 U.S. 330 (1918).

Metro-North wishes to convert a physical impact case into a zone of danger scenario in order to benefit from the greater restrictions placed on indirect victims. Metro-North takes the simple concept of "physical impact" and embroiders and

[1] Many other courts agree that ingestion or inhalation of a toxic substance constitutes a physical impact. The Third Circuit in *Plummer v. United States*, 580 F.2d 72, 75-76 (3rd Cir. 1978) held that the presence of tubercle bacilli in the bodies of the plaintiffs constituted a sufficient "physical impact" to allow compensation for emotional distress for fear of contracting full blown tuberculosis in the future. *See e.g., Laxton v. Orkin Exterm. Co., Inc.*, 639 S.W.2d 431 (Tenn. 1982); *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d Dist. 1985), review den'd, 492 So. 2d 1331 (Fla. 1986). Mere dust exposure or the inhalation of smoke has classically qualified as a physical impact. *See e.g., Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (holding that physical impact test was satisfied by the inhalation of smoke); *Porter v. Delaware, L. & W. R. Co.*, 73 N.J.L. 405, 63 A. 860 (1906) (holding that physical impact was satisfied by dust in the eye).

embellishes it with "zone of danger" limitations which do not apply, and have never applied.[2] Metro-North's attempt to create new doctrine should not be entertained by this Court. Metro-North's uncalled for additions to the physical impact doctrine are (1) physical manifestation of emotional distress; (2) severe emotional distress; and (3) medical or psychiatric evidence of distress. Pet. Br. 34, 37, and 40. Metro-North deliberately misrepresents the requirements for recovery under the physical impact rule. The simple requirement of physical impact is that there be an impact. An impact is sufficient for recovery for emotional distress without the need for physical injury or other qualifying factors.

Metro-North's entire "zone of danger" discussion is wrong. Even if one wanted to apply a zone of danger analysis to a direct impact victim, Michael Buckley could still recover in many jurisdictions.[3] Metro-North is wrong about the

[2] The Second Circuit knows how to handle negligent infliction of emotional distress claims. *Mortise v. United States, 1996 U.S. App. Lexis 33508 (2d Cir. Dec. 24, 1996* (discussing bystander recovery).

[3] Metro-North is picking and choosing "zone of danger" cases that reflect the most restrictive application of the test. There is no requirement of manifested physical injury in many jurisdictions. *Mollien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980) (stating that physical injury requirement is not justifiable). In *Hagerty v. L & L Marine Services*, 788 F.2d 315 (5th Cir.), *modified on denial of rehearing en banc*, 797 F.2d 256 (5th Cir. 1986), the Fifth Circuit ruled that neither impact nor "physical manifestations" of emotional injury are necessary for an emotional distress claim. *See also Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436 (E.D. La. 1993) (holding that no physical manifested harm was required of "zone of danger" plaintiff).

Even if this Court adopted new doctrine requiring physical impact plaintiffs to meet the manifested physical injury requirement that some courts apply to "zone of danger" plaintiffs, Michael Buckley could still recover. Metro-North contends that "the plaintiff has no asbestos related disease or physical injury and in fact shows no physical effect of any kind from asbestos exposure." Pet. Br. 5. The Second Circuit found that Michael Buckley suffered sub-clinical injury when he inhaled and ingested asbestos fibers.

applicability of the "zone of danger" as well as the record in this case that confirms that Michael Buckley was impacted and injured.

The Court in *Gottshall* rightly took the view that the broad language and humanitarian purposes of FELA permits bystanders to recover for mental distress so long as they were in the "zone of danger." W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* 365-6 (5th ed. 1984) (noting that American decisions permit non-impact "bystanders...to recover for mental distress provided that they were personally within the "zone of danger"). *Gottshall* does not place new restrictions on the traditional physical impact test, it expands liability to those in the zone of danger. Metro-North argues that the Second Circuit "misinterpreted and misapplied" the zone of danger test articulated by this Court in *Gottshall*. Pet. Br. 21. *Gottshall* restricted the claim of a "bystander outside the zone of danger." *Gottshall*, 114 S. Ct. at 2410. This Court was simply placing limitations on remote or indirect victims, requiring them to be "within the zone of danger of physical impact." *Id.* at 2410. A physical impact victim is by definition in the zone of danger.[4]

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[4] Michael Buckley need not meet an imminence requirement or any other qualifier placed on indirect victims. He is a direct physical impact victim. This is not a "near-miss," nor is Michael Buckley an unrelated bystander or in any other "zone of danger" scenario. The test for physical impact is analogous to a battery, because in both cases there is no need for the plaintiff to prove imminence or apprehension of a harmful or offensive contact. A "battery" requires some physical contact with another without consent and does not require any injury to be actionable. Where there is physical impact, there is no need to show fear of impact in a battery or in an emotional distress action. Metro-North's creativity is evident in its attempt to convert impact doctrine into *fear of impact* doctrine which would make it more difficult for plaintiffs to recover. Where there is impact, there is no need for imminence: impact alone is enough to certify genuineness. When in public discourse, you are referred to as one of the "Snowmen of Grand Central Station" because of being coated with asbestos dust, there can be no serious question that emotional distress is not genuine or severe.

Metro-North evades the history as well as the logic of common law precedents in attempting to convert *Gottshall's* "zone of danger" test into new doctrine which not only bars the recovery of some indirect victims, but which threatens the recovery of all direct impact victims.[5] Turn of the century American courts "refused to permit recovery for such consequences [of emotional distress] unless there had some 'impact' upon the person of the plaintiff...the theory appears to be that the 'impact' affords the desired guarantee that the mental disturbance is genuine." W. Page Keeton et. al., *Prosser and Keeton on the Law of Torts* §54 at 362 (5th ed. 1984).

Some courts adopted the "zone of danger" test to permit recovery to a delimited group of plaintiffs who suffered mental distress but whose claim could not be certified as genuine by the test of physical impact.[6] Early cases, for example,

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[5] Metro-North and its amici substitute the phrase "physical injury" for physical impact to confuse this Court. Contrary to Metro-North's assumption, traditional tort law required physical impact *or* injury. Terrence Kiely, Modern Tort Liability: Recovery for the '90s (1990). Modern courts require impact not physical injury for recovery of emotional distress. "Early 'intentional'" cases required physical manifestations of injury, *e.g.*, *Harned v. E-Z Finance. Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953), and some jurisdictions retain this requirement for negligent infliction. *Reilly v. United States*, 547 A.2d 894 (R.I. 1988). However, the trend seems to abandon in both intentional and negligence cases the requirement that the emotional distress 'ripen' into physical injury." Jerry J. Phillips, et. al, Tort Law: Cases, Materials, Problems 70 n.6 (1991).

[6] An early leading case restricting emotional distress claims to "physical impact" was *Mitchell v. Rochester R. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896). In *Mitchell*, the court denied a plaintiff's recovery for a miscarriage caused by fright from the defendant's onrushing team of horses, because of the absence of impact. Since *Mitchell*, courts have progressively allowed recovery for harm resulting from emotional distress negligently caused, even in the absence of physical impact. W. Page Keeton et. al., Prosser and Keeton on the Law of Torts §54 at 365-6 (5th ed. 1984). There is no empirical evidence that a flood of claims resulted from extending recovery beyond physical impact to bystanders and other indirect victims of emotional injuries. Thomas Lambert, Tort Liability for Psychic Injuries, 41

permitted recovery for the distress a mother would naturally experience in "observing the death of her child...provided that they were personally within the 'zone of danger'" *Id.* at 365. Some courts placed restrictions on "zone of danger" recovery for unrelated bystanders and other indirect victims because of the possibility of fictitious claims. *Id.* at 366.

The Second Circuit did not misinterpret the zone of danger test because it does not apply to the circumstances of this case. There is no doubt that immersion in asbestos dust resulted in Michael Buckley being impacted and injured.[7] The Second Circuit correctly applied the physical impact rule finding sufficiently injurious impact and injury when the "thin, needle-like asbestos fibers" become embedded in lung tissue. *Id.* at 1343.[8]

B.U.L. Rev. 584, 592 (1961) ("The truth of the matter is that the feared flood tide of litigation has simply not appeared in states following the majority rule allowing recovery of psychic injuries without impact").

[7] The defendant and its amici argue that the Second Circuit's decision permitting recovery to Michael Buckley is in conflict with the Third Circuit's decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), cert. denied, 474 U.S. 864 (1985). Pet. Br. 4. *Schweitzer* was not a FELA negligent infliction of emotional distress case and it was decided in a very different setting. Metro-North does not point out that the Third Circuit was deciding the rights of an asymptomatic plaintiff within the context of bankruptcy law. A bankruptcy proceeding often involves equitable powers to deny claims that would not be available for other courts. Douglas J. Whaley, Problems and Materials on Commercial Law 943 (4th ed. 1995) ("[t]he trustee in bankruptcy is given a number of useful rights in resisting or attacking creditor's claims"). FELA does not permit an equitable choice among valid claims in the case of Metro North, a solvent railroad.

[8] The inhalation and ingestion of asbestos also causes an immediate subclinical injury to lung tissue. In *J.H. France Refractories Co. v. Allstate Insur. Co.*, 626 A.2d 502 (Pa. 1993), the court adopted a pathologist's definition of "injury" as a "process which alters structure finding that an insurer had a duty to indemnify against an asbestos related claim. The pathologist defined the accumulation of macrophages in enveloping asbestos fibers as an "indirect injury." *Id.* at 506. It is common sense that Michael Buckley inhaled and ingested asbestos fibers after being enveloped in asbestos dust on a daily basis. Sub-clinical injury occurred as in *J.H.*

Metro-North's alternative argument is that Michael Buckley may have been impacted, but is in no different position than millions of other Americans exposed to asbestos. Pet. Br. 17.[9] Metro-North's argument is that there is no impact without physically manifested injury. The Second Circuit rightly rejected Metro-North's argument that physical impact does not occur unless and until "deadly and debilitating diseases" develops. *Id.* at 1343. In this case, Michael Buckley's being covered from head to toe in asbestos dust on a daily basis is exposure far beyond what normally would be encountered by a person in everyday life. *Redland Soccer Club v. Dept. of the Army*, 55 F.3d 827, 846 (3rd Cir. 1995) (requiring medical monitoring plaintiff to prove exposure "beyond that would normally be encountered in everyday life").

Metro-North is skeptical of the severity of Michael Buckley's emotional distress because he did not go to a psychiatrist. Inhaling and ingesting asbestos dust over a prolonged period is even more frightening than breathing in ordinary smoke or getting ordinary dirt in your eye.[10] Anyone

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France when the "macrophages attempted to ingest the fibers, releasing enzymes which had a damaging effect on injured tissue." *Id.* At the very minimum, there is sub-clinical injury already manifested.

[9] The defendants portray the plaintiff's "massive exposure" in the daily cloud of asbestos fibers as "indeterminate" and thus, indistinguishable from any other workplace exposure. Pet. Br. 16. Metro-North's own consultant found asbestos to be present in 149 of 150 samples of insulation material [JA 231-32; 615-16]. The amount of airborne asbestos was "far in excess" of OSHA's exposure limits. [JA 190; 247]. Metro-North's failure to measure the precise amount of airborne asbestos fibers at any time or any location should not immunize it from liability.

[10] The court in *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987) found the plaintiff's ingestion of water contaminated with toxic chemicals was an "[i]mmediate and direct physical impact and injury." The Fifth Circuit held that the inhalation of asbestos fibers was a physical impact in *Gideon v. Johns-Manville*

enveloped in asbestos dust on a daily basis for several years like Michael Buckley and the "Snowmen of Grand Central Station" would experience anger as well as extreme distress.[11] Metro-North dismisses the severity of the emotional distress experienced by Michael Buckley in order to trivialize his need for medical monitoring. It would not take a psychiatrist to identify one's feelings of insecurity and anxiety over such prolonged and dangerous exposure. *See Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994), *cert. denied* 115 S.Ct. 727 (1995) (relative inquiry is whether the impact would cause fear in a reasonable person).

Metro-North and its amici also claim that Michael Buckley is a "no injury" claimant. Michael Buckley suffered a sub-clinical injury that may progress into an asbestos related disease.[12] At risk workers "receive adverse treatment in

Sales Corp., 761 F.2d 1129, 1137 (5th Cir. 1985); *See also Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83 (3d Cir. 1986) (holding that an infiltration of asbestos fibers into the plaintiff's lungs was a physical impact).

11 Prosser and Keeton describe the three major concerns for judicial caution when it comes to "recovery for emotional distress: (1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act." Keeton, *supra*, at 360-61. None of these concerns are present in this case and recovery is proportional to the peril.

12 Metro-North fails to inform this court that asbestos related diseases are latent and progressive and that there are a growing number of courts that recognize medical monitoring in the absence of discernible injury. Moreover, medical monitoring was devised as a remedy for latent, not manifested disease. Monitoring serves a dual purpose of alleviating distress, as well as providing prompt detection and treatment of disease. Metro-North must know that the scientific and medical community cannot detect the symptoms of a manifested asbestos injury so few years after the exposure in this case. *See* G. John Digregorio, "Toxicology of Asbestos," 32(5) Am. Fam Physician 201-204 (November 1985) (stating that "asbestosis is a progressive form of lung fibrosis resulting from the inhalation of asbestos dust"). W.B. Jerry Younger and Eugene J. Mark, "Case 4 1987: A 50-Year-Old Man with

insurance, employment opportunity, credit and other matters based on the contents of [their] medical files." Mark A. Rothstein, Medical Screening of Workers 112 (1984).[13]

This Court held in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 2410 (1996) that a plaintiff may state a claim for negligent infliction of emotional distress if the defendant's conduct "threatens [the plaintiff] imminently with physical impact"--the zone of danger test. This "zone of danger" test was adopted as "a progressive rule of liability that was less restrictive than the physical impact test...and more consistent than the physical impact test with FELA's broad remedial goals." *Id.* at 2409. Justice Thomas observed that the *Gottshall* zone of danger was progressive and "less restrictive than the physical impact zone of danger test....and more consistent than the physical impact test with FELA's broad remedial goals." *Gottshall*, 114 S. Ct. at 2409. Metro-North seeks to place "imminence" and manifest physical injury

Recurrent Pleuropulmonary Abnormalities," 316 N. Eng. J. Med. 198 (January 22, 1987) (noting that asbestos related diseases may or may not develop within the first 20 to 25 years after exposure). The immediate present, physical injury from asbestos-exposure is sub-clinical.

13 Should Michael Buckley or his co-workers decide a career change, they may be screened out as a high risk applicant due to their medical history. Professor Mark Rothstein states that:

> Many forms of occupational cancer are characterized by long latency periods--as long as 35 years--before the disease is clinically evident. The leading example would be exposure to asbestos. Consequently, an individual with a history of previous exposures may be considered by employers to be a bad risk.

Mark A. Rothstein, Medical Screening of Workers 43 (1985). Employers are increasingly using predictive screening to "calculate which asymptomatic individuals are at an increased risk of future impairment." *Id.* at 23. A 1974 study of industrial physicians confirmed a widespread problem of "even patients with mild illness, which may not increase their morbidity or mortality, are being denied work." *Id* . at 67.

restrictions that neither *Gottshall* nor traditional tort law would apply to direct injury victims. This is not the "zone of danger" case that Metro-North wishes it to be.

II. THE SECOND CIRCUIT WAS CORRECT IN RULING THAT MEDICAL MONITORING WAS A REASONABLE MEDICAL EXPENSE COMPENSABLE UNDER FELA GIVEN MICHAEL BUCKLEY'S DAILY, UNPROTECTED EXPOSURE AND IMPACT WITH ASBESTOS FIBERS

A. THE SECOND CIRCUIT'S SOUND ANALYSIS OF MICHAEL BUCKLEY'S NEED FOR MEDICAL MONITORING IS GROUNDED IN TRADITIONAL TORT LAW AND MODERN MEDICINE

The Second Circuit correctly found that "competent expert testimony...established both that Buckley suffered a *substantial* impact from asbestos that has *significantly* increased his risk of contracting an asbestos related disease and that Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos related disease he develops." *Buckley*, 79 F.3rd at 1347. Metro-North mischaracterizes the Second Circuit's decision as permitting medical monitoring upon a showing of mere exposure, which would flood the court system with more cases than it could handle. Pet. Br. 47-50. This unfair reading of the Second Circuit's opinion is part of Metro-North's strategy to divert this Court from considering the narrow issue under FELA. There is no evidence that the Second Circuit is unmindful that we live in a society of limited judicial resources where hard choices must be made.

Far from taking a novel approach, the Second Circuit is guided by traditional tort doctrine that permits the cost of reasonable and necessary medical expense incurred and an

appropriate item of damages.[14] Contrary to Metro-North's characterization, medical monitoring is not a separate cause of action. Medical monitoring is a traditional medical expense. The Second Circuit follows the vast majority of cases that hold that medical monitoring is available in the absence of manifested physical disease.[15] Metro-North urges this Court to adopt a minority position that medical monitoring be restricted to those already manifesting the physical symptoms of an advanced disease.[16] This arbitrary restriction frustrates the

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14 Traditional common law tort law permits the allowance of reasonable future medical expenses. *See generally*, Charles T. McCormick, Handbook on the Law of Damages §90 (1935); F. Harper et. al., 4 The Law of Torts §25.9, at 557-58 (2d ed. 1986). The Second Circuit was correct in following the modern trend of the common law that assign the responsibility of medical monitoring to the wrongdoer where the plaintiff proves that recommended monitoring is reasonable, even if there is no physical manifestation. This Court need only take a traditional view of FELA recovery to compensate Michael Buckley for the quantifiable cost of periodic medical examinations which is a necessary expense and there is a value of early detection and diagnosis of asbestos related disease. FELA requires a full and fair recovery. It is only fair that Metro-North be required to pay for regular medical testing and evaluation as is reasonably necessary of a harm it caused. *See* Prosser & Keeton, Torts §30 at 165 (5th ed. 1984).

15 *See e.g. Gerardi v. Nuclear Util. Serv., Inc.*, 149 Misc. 2d 657, 658, 566 N.Y.S.2d 1002, 1003 (1991) (upholding recovery of medical surveillance expenses to two nuclear plant employees who had a history of being enveloped in asbestos dust, even though they were "not presently disabled or suffering disease from exposure to the asbestos"); *See e.g.. Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977-78 (Utah 1993) (recognizing that plaintiffs exposed to asbestos were eligible to recover medical monitoring damages absent physical injury); *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847, 848-49 (M.D. Pa. 1988) (holding that plaintiffs who ingested water contaminated with toxic chemicals were entitled to recover medical monitoring damages, absent injury provided they prove exposure, potential injury and the need for early detection and treatment).

16 Nearly every federal and state court has upheld recovery of medical monitoring cost, whether or not the plaintiff is manifesting disease. *See e.g. Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825-26 (D.C. Cir. 1984) (a negligent party is responsible for the cost of medical diagnostic tests even in the absence of physical injury to make the plaintiff whole); *Meyerhoff v. Turner Construction Co.*, 202 Mich. App. 499, 503, 509 N.W.2d 847, 849 (1993) (stating that it is "difficult to dispute that an individual has an interest in avoiding

very purpose of medical monitoring, which is to promptly detect and treat latent diseases as they develop.

Metro-North misreads *Hagerty v. L & L Marine Services*, 788 F.2d 315 (5th Cir. 1986) where the Fifth Circuit upheld medical monitoring under the Jones Act to ensure early detection and treatment of the seaman's possible cancerous condition. Metro-North argues that *Hagerty* does not stand for the abandonment of the physical injury requirement, as the plaintiff "suffered dizziness, leg cramps and a stinging sensation" from exposure. Pet. Brief 20, n. 12. This is an unfair characterization of *Hagerty*. The Fifth Circuit notes that the plaintiff's symptoms of dizziness, cramps, and a stinging sensations were evanescent and that medical monitoring was designed for the detection and treatment of the latent disease as it develops.[17]

Metro-North attempts to sow confusion as to the nature of Michael Buckley's legal claims when it cites many fear of future disease cases. Metro-North discusses every case except this one. This case stands on a different footing than the many

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expensive diagnostic examinations just as he or she has an interest in avoiding physical injury").

17 The Fifth Circuit made it quite clear that the plaintiff had no present manifested disease. The Court stated: "Aside from his ruined shoes, he suffered a brief period of dizziness, followed by leg cramps until he obtained his shower. The following day he [illegible] stinging in his extremities. Because of these symptoms, the extent of his emersion in the chemical, and his understanding of the carcinogenic effect of that chemical, he is now fearful that he will in time contract the disease. Clearly, he does not have the disease at the present time and has suffered no manifestations of any symptoms or ailments attributed to cancer." *Hagerty*, 788 F.2d at 517. The Fifth Circuit had little difficulty in finding that the victim suffered harm and a compensable injury "may be latent and not manifested and discovered until some later date." *Id.* Monitoring was designed for post-exposure, long term disease compensation not to alleviate temporary, immediate physical symptoms such as dizziness, leg cramps, and stinging sensations.

cases cited by Metro-North and its amici that restrict recovery to future disease claimants.[18] Metro-North insists that the Third Circuit's decisions in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 849-50 (3rd Cir. 1990), *cert denied*, 499 U.S. 961 (1991) ("Paoli I") and *In re Paoli Railroad Yard Litigation*, 35 F.3d 717 (3rd Cir. 1994) *cert. denied*, 115 S.Ct. 1253 (1995) (Paoli II) are allegedly undermined by a lower federal court decision.[19] The guidelines of *Paoli* have a continuing vitality in assisting courts in determining whether toxic exposures are so significant and substantial to warrant medical monitoring:

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18 The defendant cites a number of "fear of future disease" claims such as *Simmons v. Pacor, Indus.*, 674 A.2d 232 (Pa. 1996) and *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987) to buttress its argument that there is no FELA recovery for emotional distress without manifested asbestos disease. Pet. Br. 11, 12 n.6. For example, Metro-North defendant cites the "future injury" claim of *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) for the proposition that medical monitoring claims, in the absence of physical manifestation, "will consume scarce resources." Pet. Br. 44. The *Joy* court recognized the benefit of early diagnosis and treatment but refused to recognize medical monitoring "because such recovery could potentially devastate the court system." *Id.* at 39. The *Ball* court's view was that the legislature should decide on the availability of this remedy. In contrast, Congress intended fair and full recover for railway workers and intended "the creation of no static remedy." *Gottshall*, 114 S. Ct. at 2411 (J. Souter, concurring) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958)). FELA's purpose mandates that there is no hard choice to be made between recovery for full and fair recovery for Michael Buckley versus any future railway claimants. The success of the medical monitoring claim in mitigating harm would be frustrated by the imposition of an artificial and unnecessary physical injury requirement. In any case, Michael Buckley has suffered sub-clinical physiological injuries due to the inhalation and ingestion of asbestos fibers.

19 Metro-North was exposing Michael Buckley and his co-workers to massive amounts of asbestos on a daily basis a decade after the first federal products liability case unprotected exposure to asbestos fibers. *Borel v. Fibreboard Paper Products, Corp.*, 493 F.2d 1076 (5th Cir. 1972), *cert. denied*, 419 U.S. 869 (1976) (upholding an award to an insulation worker who contracted mesothelioma, a cancer of the abdominal lining caused by unprotected contact with asbestos fibers).

(1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of such exposure, plaintiff suffered a significantly increased risk of contracting a serious latent disease; (3) that increased risk made periodic diagnostic medical examinations reasonably necessary; and (4) monitoring and testing procedures existed which made the early detection and treatment of the disease possible and beneficial. *Id.* at 852.

The American Law Institute's 1991 Reporters Study recommends medical monitoring as a remedy that is tailored for latent diseases:

> Allowing medical monitoring damages acknowledges that increased risk is a form of injury but confines the award to *costs that flow from the specific harm that has already occurred, not from harms that may occur in the future.* Screening and close follow-up of the exposed population can lead to early diagnosis and treatment of potentially fatal diseases. A monetary award pays for a system of periodic medical examination of the plaintiffs. Consequently, both traditional tort and modern public health rationales support awarding such damages.
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> 2 American Law Institute Reporters' Study, Enterprise for Personal Injury 377, 380-81 (1991) (emphasis ours).

B. FELA'S STATUTORY DEFINITION OF "INJURY" IS NOT QUALIFIED BY THE WORDS "ACCIDENTAL," "IMMEDIATE," OR "MANIFEST."

Section One of FELA provides that "[e]very common carrier by railroad...shall be liable in damages to any person suffering injury while he is employed by such carrier." 45 U.S.C. §51. The FELA imposes liability for "injury" which results "in whole or in part" from the railroad's negligence. *Id.* Metro North and its amici seek to qualify the language of FELA to support its position that the cost of medical surveillance to detect and treat the onset of asbestos related disease is not compensable.

William H. DeParcq and Charles Alan Wright note that "FELA damage rules [are] a distinctive branch of the law; the frequency and severity of injuries to railroad workmen has required courts to answer questions not previously presented or settled in tort law generally." William H. DeParcq & Charles Alan Wright, "Damages Under the Federal Employers' Liability Act," 17 Ohio St. L. J.430, 431 (1956). Forty seven years ago this Court acknowledged the language of FELA "is as broad as could be framed...encompassing provision of FELA where every injury suffered by any employee...was made compensable." *Urie v. Thompson*, 337 U.S. 163, 181 (1949) (recognizing silicosis as a compensable "injury" under the FELA).

Metro-North and its amici ask this Court to convert FELA into a carbon-copy of the most restrictive common law decisions which would preclude medical monitoring in the absence of already manifested disease. The historical purpose of FELA is to broadly construe injury broadly to "adjust equitably between worker and carrier the inescapable expense of human overhead in railroading." *Kernan v. American Dredging Co.*, 355 U.S. 426, 431, 438 (1958).

A railroad employee has long been "entitled to recover compensation...as it is susceptible of estimate in money, for the loss and damage cause to him by the defendant's negligence."

M.G. Roberts, 2 Federal Liabilities of Carriers §891 at 1740 (2d ed. 1929). In *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), a defendant railroad argued that it had little opportunity to inspect a defective door in a "foreign" railway car that caused injury to an employee. The late Chief Justice Earl Warren dismissed this argument noting FELA's preemptive duty to provide employees with a safe workplace. Justice Warren was concerned that "legal technicalities" could "perhaps remove from coverage of the Act a significant area of railroad activity." *Id.* at 10.

Metro-North's effort to have this Court adopt a "present physical manifestation" rule for medical monitoring is a ploy to make FELA inapplicable to toxic exposures which involve a long latency period. The effect will be to remove damages stemming from latent occupational injuries from FELA coverage. Metro-North asks this Court to frustrate the humanitarian and remedial purposes of FELA by permitting "legal technicalities" to frustrate the public health purpose of medical monitoring.

There is no specter of bankruptcy haunting Metro-North like the asbestos defendants in many of the cases wrongly cited by the defendant and its amici. Michael Buckley's exposure began in the mid-1980's, long after the risk of unprotected exposure to asbestos was generally known. No floodgate of litigation can be opened by this Court affirming the Second Circuit's decision to permit medical monitoring.

The Second Circuit's decision as to the reasonable necessity of medical monitoring is controlled by liberally construed federal common law, not the most restrictive common law cases that the defendant can find. This Court's task is to "develop a federal common law of negligence under FELA, informed by reference to the evolving common law." *Gottshall*, 114 S. Ct. at 2411 (1994) (J. Souter, concurring).

This Court recognizes that FELA remedies must be flexible and be developed and enlarged "to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan v. American Dredging Co.*, 355 U.S. at 432.

C. THE REMEDY OF MEDICAL MONITORING ADVANCES THE DETERRENCE FUNCTION OF FELA.

This Court in *Gottshall* stated that "FELA was intended to provide compensation for the injuries and deaths caused by the physical dangers of railroad work...By imposing liability, FELA presumably also was meant to encourage employers to improve safety measures in order to avoid those claims." *Gottshall*, 114 S. Ct. at 2410. "FELA serves as a real and valuable incentive to promote employee safety in the railroad industry, which remains one of the most hazardous in this country." Jerry J. Phillips, "An Evaluation of the Federal Employers' Liability Act," 25 San Diego L. Rev. 49, 49 (1988).

Metro-North's reckless disregard of Michael Buckley's safety is more egregious than the railroad's PCB contamination in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d at 829.[20] Metro-North could have eliminated the asbestos danger entirely by providing proper respiratory protection to prevent Michael Buckley from inhaling asbestos

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[20] It is wrong to compare Metro-North's reckless indifference to cases against manufacturers of asbestos who sold a product forty or fifty years ago to an employer who is flagrantly exposing his own employees to asbestos fibers. Metro-North was exposing Michael Buckley and his co-workers to massive amounts of asbestos on a daily basis a decade after the first federal products liability case of unprotected exposure to asbestosis fibers. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1972), *cert. denied*, 419 U.S. 869 (1976) (upholding an award to an insulation worker who contracted mesothelioma, a cancer of the abdominal lining from unprotected contact with asbestos fibers).

fibers. Metro-North saved money by employing untrained and unlicensed workers to handle and remove asbestos insulation without adequate protection.[21] This Court should also consider the high probability that Metro-North might have escaped detection or punishment altogether if Michael Buckley had not filed this claim. "[I]njurers will not take care in the absence of liability, and the outcome will therefore generally depart from the optimal." Steven Shavell, *Economic Analysis of Accident Law* 11 (1987). Medical monitoring award is a necessary deterrent that will keep Metro-North from externalizing these costs by sacrificing worker safety for profits.

Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987), an authority cited by Metro-North[22] recognized deterrence as a cogent policy consideration for recognizing pre-symptom claims for medical surveillance. *See also Ayers v. Jackson Township*, 525 A.2d 287, 311 (N.J. 1987); *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984) (holding that Vietnamese children in an airplane crash caused by manufacturer's negligence were entitled to medical examinations in order to determine if they suffered neurological deficits and the defendants should pay for them to deter future wrongful conduct) and *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1006-07, 863 P.2d 795, 822-23 (1993) (allowing claims for medical monitoring to deter the irresponsible dumping of hazardous substances). This Court should reject Metro-North's narrow, technical approach to FELA because of the clear need for medical monitoring to deter employers who trade safety for profits.

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21 The outside contractor's trained and licensed workers would have cost Metro-North nearly four times as much per hour as the regular rate of $10.00 paid Michael Buckley and his co-workers. [JA 475, JA 628, Exhibit 1078 (noting $37.00 per hour wage rate for outside contractor qualifed asbestos handlers).

22 Pet. Brief 12, n.6.

D. MEDICAL MONITORING ENABLES WORKERS TO PLAY A MEANINGFUL ROLE IN MITIGATING THE PROGRESSION OF THEIR ASBESTOS RELATED INJURIES

Medical monitoring helps to reduce the overall costs to Metro-North by mitigating the effects of asbestos related disease. Medical monitoring in these circumstances is consistent with the "avoidable consequences rule" of conventional tort law that requires plaintiffs to take reasonably necessary steps to alleviate their condition or be precluded from recovery. *See Restatement (Second) of the Law of Torts* §918(1) (1977) *See* Charles T. McCormick, *Handbook on the Law of Damages* §33 (1935). The medical monitoring remedy is tailor-made to promptly detect and treat asbestos related illnesses as they develop. Medical monitoring is a remedy designed to mitigate Michael Buckley's severe emotional distress at being susceptible to developing an asbestos related disease.[23]

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23 The Fifth Circuit held that medical monitoring of an asymptomatic plaintiff advanced the "avoidable consequences" rule in *Hagerty v. L & L Marine Services Inc.*, 788 F.2d 315 (5th Cir. 1986). The court upheld medical checkups of a toxic exposure claimant to facilitate the "early detection and treatment of a possible cancerous condition." *Id. See also, Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993) (describing monitoring as a form of "mitigation of damages"). *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984) (noting that monitoring advanced avoidable consequences rule). *See generally*, Marilyn Minzer, et. al., 2 Damages in Tort Actions §16.00 at 16-11 (1994) (describing avoidable consequences rational for medical monitoring).

E. THERE IS NO LIKELIHOOD THAT RECOGNIZING MEDICAL MONITORING WILL RESULT IN A LITIGATION EXPLOSION

The "universe of potential FELA plaintiffs... is hardly 'infinite'" because FELA does not govern the "public at large." *Gottshall*, 114 S. Ct. *supra* at 2418 (J. Ginsburg, dissenting). In any case, it would be a perversion of the Act for this Court to show excessive concern for the corporate pocketbook by immunizing Metro-North from liability for its reckless disregard of its duty to maintain a safe workplace. *See* DeParcq & Wright, *supra* at 431 (stating that some courts have protected the corporate pocketbook at the expense of FELA's statutory purpose of providing "full and fair compensation" for the injured person). The proliferation of meritorious claims is no reason to deny justice. *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 133, 447 N.E.2d 109, 111 (1983). It is difficult to imagine anyone having the incentive to file a monitoring lawsuit in order to periodically submit to unnecessary medical tests and procedures. *In Re Paoli R. Yard PCB Litigation*, 35 F.3d at 788 (observing that flood of litigation was unlikely "because a plaintiff is not likely to desire to submit to additional tests unless he or she thinks the tests are really needed").

III. THIS COURT SHOULD CONSIDER ABANDONING THE SINGLE CONTROVERSY RULE IN FELA TOXIC TORT CASES

Metro-North argues for the first time to this Court that medical monitoring "will create intractable problems with regard to claims-splitting and statutes of limitations." Pet. Br. 18. The defendant's untimely argument expresses concern that Michael Buckley may be barred from recovering for a future manifest asbestos related disease, if medical monitoring expenses are permitted. The defendant's concern is yet another

example of its strategic tactic of imploring this Court to adopt the most restrictive common law rule to thwart FELA's goal of full and fair recovery for an injured worker.

Should this Court decide to address the claim splitting issue *sua sponte*, it should reject the regressive single controversy rule that undermines the principle of full and fair recovery for latent, progressive diseases. Should Michael Buckley manifest an asbestos related disease, the costs will inevitably be shouldered by his family or taxpayers if the outmoded single controversy rule is followed. The modern trend of toxic tort law is to permit medical monitoring without precluding recovery for disease that may appear many decades later. *See* e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) (construing the "claim splitting" rule so as not to preclude a workers's suit for latent asbestos related disease); *Hagerty v. L & L Marine Services Inc.*, 788 F.2d 315 (5th Cir. 1986) (stating that "[a]t least in the toxic chemical or asbestos cases, the [latent disease] should be treated as a separate cause of action for all purposes" *Id.* at 320. Should this Court address the problem of statute of limitations, it will adopt a "discovery rule" that tolls asbestos workers' cause of action at the manifestation of a disease rather than the time of exposure.

This Court recognized that FELA is a remedial statute when it held that an action for a manifested occupational disease accrues upon discovery, when the plaintiff knew or should have known of the clinical manifestations. *Urie v. Thompson*, 337 U.S. 163 (1949) (recognizing discovery rule for silicosis). As to claims-splitting, Michael Buckley should not lose his claim for a more serious disease that may occur later, because he follows precautions recommended by his doctor. The eradication of inequitable barriers against recovery gives substance to FELA's statutory mandate of full

and fair compensation for workplace injuries caused by the railroad's negligence.

CONCLUSION

Accordingly, Amici Curiae, respectfully submit that the decision of the Second Circuit should be affirmed.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
JAN 14 1997
CLERK

No. 96-320

In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* RAIL LABOR EXECUTIVE ASSOCIATION

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Rail Labor Executives' Association (RLEA) is a voluntary, unincorporated association of the Chief Executive Officers of seven standard labor organizations which collectively represent operating, non-operating and shop craft employees of our nation's railroads. RLEA was formed in 1926, and has been the policy spokesperson for its affiliated organizations before Congress, the courts, administrative agencies and Executive Departments on matters that affect rail employees generally, including safety matters.

One area of concern to RLEA and its members has been the proper interpretation of the Federal Employers' Liability Act (FELA), because that Act is so vital to the safety of rail employees. Rail employees are not covered by state workers' compensation laws, but must look to the FELA to obtain redress for on-the-job injuries they suffer. Consequently, it is important to RLEA and its members that the FELA be interpreted and applied in a manner which implements the basic purpose of the Act--providing compensation for rail employees who are injured through the negligence or fault of their employers. Equally important to RLEA as a policy matter is the deterrent effect of the FELA, for the Act operates as a financial incentive to rail employers to provide their employees with safe places in which to work. The safer the work place, the lower the carriers' FELA costs.

Occupational diseases have always presented an issue of great concern to RLEA, especially where, as in this case, rail employers knowingly expose their employees to materials they know to be hazardous without providing effective protective gear and training. RLEA and its members have a very real and vital interest in assuring that the protection

against occupational hazards which the FELA provides to rail employees is not diluted by a narrow construction of that Act.

Letters of consent by the parties for the filing of this Brief are attached hereto.

SUMMARY OF ARGUMENT

In *Consolidated Rail Corp. v. Gottshall*, this Court, relying on the common law of tort liability, held first that emotional harm is an appropriate element of recovery under the Federal Employers' Liability Act (FELA). But in so doing, this Court also ruled that there can be no recovery for emotional harm stemming from concern for the safety of a fellow worker. In so ruling, this court rejected "bystander" liability, which, the plaintiff in *Gottshall* argued, would have permitted him to recover for such harm. Rather, this Court adopted the "zone of danger" rule, under which a person not suffering physical impact must be put to the foreseeable risk of such an impact in order to recover emotional harm damages. This Court then remanded the case for a determination of whether Gottshall satisfied this latter test.

In rejecting bystander liability for FELA purposes, this Court did not reject the "impact" test as a basis of recovery for emotional harm. This court was not called upon to consider the continued viability of the impact test, since Gottshall did not claim that he suffered any impact that would trigger liability under that test.

In the case under review, it is clear that the Respondent Buckley did suffer an impact--the massive and consistent exposure to asbestos fibers. Under the traditional common law impact rule, the plaintiff need not suffer physical harm as

a result of the impact, nor need the emotional harm be serious, although there is evidence to support the conclusion that Respondent's injury was physical, and that the emotional harm was, and continues to be, serious.

When a plaintiff has suffered an impact, it is a bit awkward to speak of the zone of danger as the test of liability. To the extent that it is ultimately concluded that this Court in *Gottshall* did develop a unitary zone of danger test of emotional harm liability, given the nature of Respondent's harm, the evidence in this case satisfies this Court's zone of danger test as well.

ARGUMENT

I. IN DETERMINING THE CIRCUMSTANCES UNDER WHICH RECOVERY OF DAMAGES FOR EMOTIONAL HARM IS APPROPRIATE UNDER THE FELA, THIS COURT HAS TURNED TO THE COMMON LAW AS THE PRIMARY SOURCE OF AUTHORITY.

While the FELA carries with it its own jurisprudence with respect to recovery for emotional harm, this Court has turned primarily to the common law. As stated in *Gottshall*:

> Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision.

114 S. Ct. at 2404.

For this reason, it is important to determine whether Respondent could recover under general common law tort principles.

II. THE IMPACT TEST OF LIABILITY FOR EMOTIONAL HARM REMAINS A VIABLE TEST OF LIABILITY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

The earliest rule permitting recovery for negligently inflicted emotional harm is the "impact" rule. Under this rule, the plaintiff is entitled to recover emotional harm damages if there has been an impact.[1] The recognizable intangible harm for which recovery may be had includes, naturally enough, the physical pain and suffering associated with the impact, but it is not limited to that. Recovery may be had, for example, for the emotional harm resulting from disfigurement (see *Kravenas v. Algonquin Township*, 301 N.E.2d 490 (Ill. App. 1973)), and from loss of enjoyment of activities (see *McDougald v. Garber*, 536 N.E.2d 372 (N.Y. 1989)). The impact rule also permits recovery for fright, whether of an impending impact to the plaintiff (see *Robb v. Pennsylvania Railroad Co.*, 210 A.2d 709 (Del. 1965)), or of the later consequences to the plaintiff of an impact that has already taken place (see *Plummer v. United States*, 580 F.2d 72 (3rd Cir. 1978)).

A rule that permits recovery for such fright only when there is an impact is not a stable rule. If fright--fear of an

1. See, in general, Richard N. Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm - A Comment of the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 485-488 (1982), hereinafter *Liability to Bystanders*.

impact or of its consequences--is worthy of compensation, then recovery should depend on whether there was fright, and not whether there was an impact. Courts perceived this discontinuity between the rule of liability (there must be an impact) and the rule of damages (recovery for fright) and developed the "zone of danger" test. Under this test, there may be recovery for emotional harm stemming from fright even if the plaintiff has not suffered a physical impact if the plaintiff is in the "zone of danger" of such an impact. The leading early case adopting the zone of danger rule is *Dulieu v. White & Sons*, [1901] 2 K.B. 669. The zone of danger test became the majority rule in this country,[2] although in many cases the issue was not whether someone in the zone of danger could recover, but whether someone outside the zone could. (See *Waube v. Warrington*, 258 N.W. 497 (Wis. 1935)). According to the court in *Waube*, there were two facets to the zone of danger rule: first, the plaintiff had to be in the zone of danger of physical impact, and second, the fear had to be for the plaintiff's own safety.

The most recent development in the law of recovery for emotional harm involves persons who are not in any physical danger themselves, but who suffer emotional harm as a result of a concern for the safety of others. Such a plaintiff was involved in *Waube*, and recovery was denied, even in the face of serious physical injury--in that case death. Most courts denied recovery in these "bystander" cases, for a variety of reasons, until the issue was presented to the Supreme Court of California in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968)). The court, overturning precedent no more that five years old (see *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513

2. See 3 Fowler Harper, Fleming James, Jr., Oscar S. Gray, *The Law of Torts* 689 (2nd Ed. 1986).

(Cal. 1963)), held that under some circumstances the bystander could recover for fear for the safety of others. Whether the plaintiff could recover, the court ruled, depended on the relationship of the plaintiff to the incident involving the primary victim of the defendant's negligence. Relevant was the geographic relationship (was the plaintiff at the scene?); the temporal relationship (did the plaintiff see the threat to the primary victim's safety?) and the familial relationship (was the plaintiff closely connected to the primary victim?) Soon, many other states followed the California lead, and also expanded liability for emotional harm to include that suffered by bystanders, although the contours of the circumstances required for recovery varied somewhat from state to state. See, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, *Prosser and Keeton on The Law of Torts* 366-367 (5th Ed. 1984).

It is against this doctrinal backdrop that the plaintiff in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396 (1994), made his claim under the FELA. The plaintiff in *Gottshall* alleged that he suffered severe emotional distress caused by his witnessing the death of a co-worker. This Court, in an opinion by Justice Thomas, ruled that while emotional harm is compensable under the FELA, liability would not be extended to those outside the zone of danger. The plaintiff, not having been in that zone, could not recover.[3]

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3. The trial judge granted the Railroad's motion for summary judgment (*Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778 (E.D. Pa. 1991). The Third Circuit reversed and remanded for trial. 988 F.2d 355 (3rd Cir. 1993). While this court rejected bystander liability, it did remand for a determination of whether the plaintiff was in the zone of danger. 114 S. Ct. at 2411. On remand, the Third Circuit ruled that the plaintiff clearly was not. *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530 (3rd Cir. 1995).

Thus, the only issue facing this Court in *Gottshall* was whether one outside the zone of danger could recover emotional harm damages. This Court did not need to, nor did it, specifically address the issue of whether the impact rule would apply in cases in which there was an impact. While the Court did state, "We agree that the zone of danger test best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence." (114 S. Ct. at 2410), that statement must be read in the context in which the case arose. The contest in *Gottshall* was between the zone of danger rule and a rule which permits recovery by those not in the zone of danger. Thus, when the Court stated that the zone of danger rule "best reconciles the concerns of the common law" with those of the FELA, it did no more than choose the zone of danger rule instead of the broader liability rule. Thus, *Gottshall* does not stand for the proposition that recovery under the FELA may not also be had under the impact rule, where that rule fits the facts.

Indeed, the court in *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2nd Cir. 1994), *cert. denied*, 115 S. St. 727 (1995), specifically assumed that the impact rule survives *Gottshall*. And a number of courts applying the common law have also specifically ruled that the impact rule survives the more recent broader liability rules.[4] In *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985), the court adopted a bystander liability rule. In *Sguros v. Biscayne Recreation Development Co.*, 528 So. 2d 376 (Fla. App. 1987), the court said that *Champion* was limited to bystander cases; if the plaintiff fears for his or her own safety, the

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4. As pointed out in Section I of this Brief, courts have turned to the common law as a source of authority under FELA.

impact rule must be satisfied. And in *Plummer v. United States*, *supra*, the Third Circuit ruled that when there is an impact, the plaintiff can recover under the impact rule and need not rely on the zone of danger rule.

Especially noteworthy in this regard is *Corgan v. Muehling*, 574 N.E.2d 602 (Ill. 1991), in which the court ruled that the zone of danger rule does not apply to cases involving "direct victims" as plaintiffs. The defendant in *Corgan* argued, as does Petitioner here, that the plaintiff failed to state a cause of action under the zone of danger rule because she failed to allege the requisites of recovery, including physical injury, established in *Rickey v. Chicago Transit Authority*, 457 N.E.2d 1 (Ill. 1983). In *Rickey*, the court ruled that one in the zone of danger of physical impact could recover absent actual impact if, among other things, physical injury or illness could be shown. But the court in *Corgan* ruled that *Rickey* and the zone of danger rule did not apply when the plaintiff did not claim recovery based on her presence within the zone of danger. If the plaintiff is a "direct victim," the court ruled, the zone of danger requirements established by *Rickey*, including that of physical injury, simply do not apply.[5]

Thus, the impact rule remains a viable basis of liability; there is certainly nothing in *Gottshall* that requires a contrary conclusion.

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5. For the same reasons, *Liability to Bystanders*, note 1, *supra*, cannot be cited in support of the proposition that the zone of danger test overrides the impact rule, as Petitioner suggests on pages 28-29 of its Brief. The author of that article, like the court in *Gottshall*, was concerned only with whether liability for negligently inflicted emotional harm should be extended to those outside the zone of danger, and not with the continued viability of the impact rule.

III. ON THE FACTS OF THE CASE UNDER REVIEW, RESPONDENT IS ENTITLED UNDER THE IMPACT RULE TO RECOVER DAMAGES FOR HIS EMOTIONAL HARM CAUSED BY HIS EXPOSURE TO ASBESTOS FIBERS.

A. RESPONDENT'S EXPOSURE TO ASBESTOS FIBERS IS SUFFICIENT TO CONSTITUTE AN IMPACT UNDER THE IMPACT RULE.

In the usual cases involving impacts which result in physical injury, we think of impacts with large objects, such as automobiles or trains--impacts that furnish the typical grist for the personal injury mill. But negligence cases do not exclusively involve impacts with large objects. Small objects, such as bullets, also suffice.

In the case under review, Respondent was impacted with asbestos fibers to the point that he, and his co-workers, were called the "snowmen of Grand Central." *Buckley v. Metro-North Commuter Railroad*, 79 F.3d 1337, 1340 (2nd Cir.), *cert. granted* 117 S. Ct. 379 (1996). Impact with smaller particles than asbestos fibers have been held to be sufficient to satisfy the rule. In *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), for example, the court ruled that the plaintiff's exposure to x-rays was a "physical contact" for the purposes of recovery of emotional harm damages. In *Laxton v. Orkin Exterminating Co., Inc.*, 639 S.W.2d 431 (Tenn. 1982), the plaintiffs drank water that had been contaminated with chlordane used by the defendant for termite eradication. The court upheld a jury instruction that the ingestion of "any amount of the toxic substance ... is at least a technical physical injury" justifying emotional harm damages. 669

S.W.2d at 434. In *Laxton*, as in *Deutsch*, it is clear that the reference is to "impact" and not to some demonstrable physical injury, since the court recognized that the plaintiff had not proved any such physical injury. To the same effect is *Plummer v. United States*, *supra*, in which the court ruled that exposure to tuberculosis bacilli satisfies the requirement of an impact.

In a different context, it was held that particulate matter from a factory that fell on the plaintiff's land was a physical invasion of the land for trespass purposes. See *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Ore. 1959), *cert. denied*, 362 U.S. 918 (1960).

That impact with small particles satisfies the impact requirement is consistent with the rule that any impact, no matter how slight, is sufficient. See *Warren v. Boston & M. R.R.*, 40 N.E. 895 (Mass. 1895). Although given the extent of the impact in the case under review, it can hardly be characterized as "slight."

Thus, this case satisfies the threshold requirement of the impact rule that there be an impact.

B. UNDER GENERAL COMMON LAW PRINCIPLES, ONCE THE PLAINTIFF HAS SATISFIED THE REQUIREMENT OF AN IMPACT, NO FURTHER SHOWING OF PHYSICAL HARM OR INJURY IS NECESSARY FOR RECOVERY OF DAMAGES FOR EMOTIONAL HARM.

While the history of recovery for intangible harm in negligence cases is not clear, some early American cases

limited recovery to that caused by the physical pain associated with a physical injury. See *Illinois & St. Louis R.R. Co. v. Stables*, 62 Ill. 313 (1872); *Johnson v. Wells, Fargo & Co.*, 6 Nev. 558 (1887). And then, as now, there was no requirement that the pain and suffering itself cause additional physical harm.

Eventually, courts began to recognize other elements of intangible harm, including fright, as appropriate elements of recovery in personal injury cases. See *Liability to Bystanders*, note 1, *supra*, at 487. Because fright-caused emotional harm was included with pain and suffering as appropriate for recovery, there was no requirement that the plaintiff suffer any injury other than the impact to recover fright damages. And the early cases so held, without much discussion. See, e.g., *Porter v. Delaware, L. & W. R. Co.*, 63 Atl. 860 (N.J. 1906):

> The proof by the plaintiff was that she was hit on the neck by something, and that dust from the falling debris went into her eyes. Proof of either of these physical injuries would take the case out of the rule as to nonrecovery for fright alone.

It is clear that the reference by the court to "physical injuries" is to "physical impacts." There is nothing in the case to suggest any physical injury other than the impacts referred to. See also *Warren v. Boston & M. R.R. Co.*, *supra* (slight impact sufficient to satisfy impact rule, and no allegation of physical injury as a result of the impact).

Later cases applying the impact rule also have held that no independent physical injury is required for recovery. In *Laxton v. Orkin Exterminating Co., Inc.*, *supra*, for example,

the plaintiffs drank water that had been contaminated with chlordane by the defendant's anti-termite treatment. The court held that the ingestion of the chlordane was sufficient to satisfy the impact requirement, and for that reason the plaintiffs could recover for fear caused by the exposure to chlordane with no further proof of physical injury. Recovery was permitted even though "the mental health of the [plaintiffs] did not evidence itself in any physical way. Neither was it severe enough to require medical treatment." 639 S.W.2d at 433. Other modern impact cases in which the courts have ruled that physical injury beyond the impact is not necessary to recovery for emotional harm include *Marriott v. Sedco Forex International Resources, Ltd.*, 827 F. Supp. 59 (D. Mass. 1993); *Plummer v. United States*, *supra*; and *Deutsch v. Shein*, *supra*.

C. UNDER GENERAL COMMON LAW PRINCIPLES, ONCE THE REQUIREMENT OF AN IMPACT IS SATISFIED, THE PLAINTIFF NEED MAKE NO FURTHER SHOWING THAT THE EMOTIONAL HARM IS SEVERE.

As indicated in the preceding section, damages for emotional harm stemming from fright became part of the damages generally available, along with damages for physical pain and suffering. Since no particular showing of severity of harm caused by the physical pain of an injury was required, neither was a showing of severity required in connection with the other elements of intangible harm for which recovery was available. See *Warren v. Boston & M. R.R. Co.*, *supra*; *Christy Bros. Circus v. Turnage*, 144 S.E.

680 (Ga. App. 1928).[6] Consistent with this, more recent cases also have refused to impose a threshold requirement of severity. See, e.g., *Binns v. Fredenall*, 513 N.E.2d 278 (Ohio 1987).

IV. EVEN UNDER THE ZONE OF DANGER TEST AS ADOPTED BY THIS COURT IN *GOTTSHALL*, RESPONDENT IS ENTITLED TO RECOVER DAMAGES FOR HIS EMOTIONAL HARM.

While it is difficult to conceptualize applying the zone of danger test to a case in which there has been an actual impact,[7] Petitioner argues that *Gottshall* established a unitary test--the zone of danger rule--of recovery of emotional harm damages. The consequence of that unitary test, the Petitioner argues in its Brief, is that to recover for emotional harm under the FELA, a plaintiff must establish that the emotional harm itself triggered a physical injury, that the emotional harm be severe, and that the fear be of "imminent physical harm." However, none of these are requirements for recovery under the zone of danger rule.

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6. In *Ob-Gyn Associates of Albany v. Littleton*, 386 S.E.2d 146 (Ga. 1989), the court modified the Georgia impact rule to require physical harm for emotional harm recovery.

7. The zone of danger test might, of course, serve to limit liability of a negligent defendant even if there is an impact; the plaintiff must prove that the impact was a foreseeable consequence of the defendant's negligence. The still-leading case is *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). There is no question in the case under review here, however, that the impact suffered by Respondent was foreseeable to Petitioner--indeed, it was certain to occur.

A. UNDER THE ZONE OF DANGER TEST, THERE IS NO REQUIREMENT THAT THE EMOTIONAL HARM BE MANIFESTED BY PHYSICAL INJURY.

While it is true that some courts have required a physical manifestation or injury resulting from emotional harm when the basis of liability has been the zone of danger rule, many courts have held that there should be no such requirement. The leading case rejecting a physical harm requirement in negligently inflicted emotional harm cases is *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980). The court felt that the requirement is both overinclusive and underinclusive: overinclusive because physical injury would not necessarily mean that the plaintiff deserves compensation, and underinclusive because some plaintiffs otherwise deserving of compensation would be denied it. As to the latter, the court stated:

> More significantly, the classification is underinclusive because it mechanically denies court access to claims that may well be valid and could be proved if the plaintiffs were permitted to go to trial.

616 P.2d at 820.

The Supreme Court of California was also concerned with the ability of plaintiffs to fabricate the existence of physical harm just for the purpose of achieving their primary goal of emotional harm damages: "[I]t encourages extravagant pleading and distorted testimony." 616 P.2d at 820. In summary, the court concluded:

> In our view of [sic] the attempted distinction between physical and psychological injury merely clouds the issue. The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn of this artificial and often arbitrary classification scheme.

616 P.2d at 821.

Later cases that have adopted the zone of danger rule also reflect the concern of *Molien* with the unfairness and unworkability of the physical injury requirement. In *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, *modified on denial of rehearing en banc*, 797 F.2d 256 (5th Cir. 1986), the court, after ruling that neither impact nor "physical manifestations" of emotional harm are necessary to determine the genuineness of the claim, stated:

> We believe the courts have better devices with which to choose between the worthy and the unworthy.... With or without physical injury, a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence. The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness. It is for the jury to decide questions such as the existence, severity and reasonableness of the fear.

788 F.2d at 318. See also *Anselmi v. Penrod Drilling Corp.*, 813 F. Supp. 436 (E.D. La. 1993), in which the court permitted a plaintiff in the zone of danger to recover absent physical injury caused by the plaintiff's emotional harm.

A number of courts have not required independent physical injury even in bystander liability cases, cases in which it might be expected that courts would be particularly concerned with limiting emotional harm liability. In *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986), the court rejected a physical injury requirement for bystander liability, stating:

> One purpose of a damage limitation is the prevention of fraudulent claims. But, given the restrictions we have imposed upon the cause of action, we do not perceive a need for further limitation upon damages. If the first three limitations are satisfied[8] we can be quite sure that the cause of action is within the realm of legitimacy. A further limit on damages is more likely to hurt a deserving plaintiff than it is to defeat a meritless claim. The rule we adopt provides that once an injured party has established duty, breach and proximate cause, he will be compensated for his entire damage so that he is made whole.

719 P.2d at 200. See also *James v. Lieb*, 375 N.W.2d 109, 116 (Neb. 1985): "While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the recent state of medical science and

8. The reference here is to the three factors set out in *Dillon v. Legg*, *supra*, as relevant to bystander recovery. (Author's footnote.)

advances in psychology."; *Folz v. State*, 797 P.2d 246 (N.M. 1990); *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433 (Me. 1982).

A requirement of physical manifestation has also been rejected in other contexts. In *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex. 1987), the plaintiff's claim for emotional harm was based on negligent mishandling of a corpse--in this case a miscarried fetus. The court, relying on *Molien v. Kaiser Foundation Hospitals*, *supra*, stated that the physical injury requirement was both underinclusive and overinclusive, and also echoed *Molien*'s concern with "extravagant pleading and distorted testimony." "The problem is one of proof," the court stated, "and to deny a remedy in all cases because some claims may be false leads to arbitrary results which do not serve the best interests of the public. Jurors are best suited to determine whether and to what extent the defendant's conduct caused compensable mental anguish by referring to their own experience." 730 S.W.2d at 654. See also *Johnson v. Supersave Markets, Inc.*, 686 P.2d 209, 213 (Mont. 1984):

> This court adopts the species of case approach which requires a factual analysis of each case to determine whether the alleged "emotional distress" merits compensation. In determining whether the distress is compensable absent a showing of physical or mental injury, we will look to whether tortious conduct results in a *substantial* invasion of a legally protected interest and causes a *significant* impact upon the person of the plaintiff.

There is no question that in the case under review, the invasion of Respondent's "legally protected interest" was "substantial" and that the impact upon Respondent's person was "significant."

Finally, many courts responding to a felt need to provide compensation in deserving cases, have made it difficult to distinguish between physical injury and emotional harm. These cases rarely involve the typical physical injury in negligence cases--the broken bone and the punctured skin. Rather, the types of injuries are much more subtle, and the line between the emotional and physical is a wavering line at best. Courts have been called upon to determine whether a variety of manifestations are sufficiently physical to satisfy the requirement. For example, in *Toms v. McConnell*, 207 N.W.2d 140 (Mich. App. 1973), the court ruled that the physical harm requirement was satisfied by proof that the plaintiff "has withdrawn from normal socialization, was for a period of nine months following the accident unable to function as she did previously, and continues in a state of depression." 207 N.W. 2d at 145. And in *Garrett v. City of New Berlin*, 362 N.W.2d 137 (Wis. 1985), hysteria at the scene of the accident, according to the court, satisfied the physical harm criteria. Other cases ruling that the plaintiff suffered physical injury include *Robb v. Pennsylvania Railroad Co.*, *supra* (cessation of lactation); and *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) ("nightmares, sleepwalking, nervousness and irritability"). With cases like these, the line between physical and mental injury is too evanescent to function as a line between those cases in which the plaintiff should be able recover for emotional harm and those in which the plaintiff should not.

B. UNDER THE ZONE OF DANGER TEST, THERE IS NO REQUIREMENT THAT EMOTIONAL HARM BE SEVERE TO BE COMPENSABLE.

Although some cases applying the zone of danger test of emotional harm recovery do mention that the harm must be severe, many others do not, and, as will be seen, an independent severity requirement is inconsistent with this Court's opinion in *Gottshall*. *Hagerty v. L & L Marine Services* and *Anselmi v. Penrod Drilling Corp.*, both discussed *supra* in connection with the physical injury requirement, and both adopting the zone of danger rule, rejected any threshold proof of severity of the emotional harm. *Anselmi* involved emotional harm suffered by an oil rigger, and is particularly instructive. In rejecting a severity requirement, the court observed:

> While this Court is well aware of the case lore that characterizes seamen as a hearty breed, one would imagine that a severe explosion on a rig in the middle of the Gulf at 3 a.m. would shake the fibre of the heartiest of men.... Whether the plaintiff's frightened reaction to the incident is a reasonably foreseeable consequence of the defendant's negligence, however, is a question for the jury and cannot be dealt with summarily by invoking the machismo of seamen.

813 F. Supp. at 443. Even some courts adopting a bystander recovery rule have rejected a severity requirement. *See, e.g.*, *Gates v. Richardson*, *supra*. And, it follows, that if there is no threshold severity requirement, there need be no medical

or psychiatric testimony supporting the claim of the plaintiff. See *Folz v. State*, *supra*.

Many of the courts that have suggested that there is a severity requirement have defined "severity" in a way that makes it in most cases a jury issue. In *Culbert v. Sampson's Supermarkets, Inc.*, *supra*, the court in adopting bystander liability, said that the emotional harm suffered by the plaintiff must be serious. In defining what is serious, the court relied on and quoted Hawaii cases, one of which was *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970), in which the court said:

> We hold that serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.

472 P.2d at 520. In *Rodrigues*, the plaintiffs were able to recover for the emotional harm caused by the physical damage negligently caused by the defendant to their home.[9]

Furthermore, and more tellingly, a threshold requirement of severity is directly contrary to the reasoning of this Court in *Gottshall*. The Third Circuit's opinion in that case rejected any doctrinal barriers to recovery, asserting that the issue is whether there is "a threshold assurance that there is a likelihood of genuine and serious emotional injury." 988

9. While many courts perhaps would not follow *Rodrigues* in permitting emotional harm recovery for damage to property, some do, even in breach of contract cases. See, e.g., *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979) (sale of new house); *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301 (Ala. 1991) (sale of new automobile).

F.2d at 371. This Court specifically rejected this as a threshold screening device:

> Such a fact-specific test, moreover, would be bound to lead to haphazard results. Judges would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts. To the extent that the genuineness test could limit potential liability, it could do so only inconsistently.

114 S. Ct. at 2409.[10] Once the plaintiff is within the zone of danger, there is no further doctrinal barrier to recovery related to the severity of the injury. Of course, the jury in its discretion could make the determination that a given

10. See also Pearson, *Liability to Bystanders*, note 1, *supra*, at 511:

> It is difficult to imagine how a set of rules could be developed and applied on a case-by-case basis to distinguish severe from nonsevere emotional harm. Severity is not an either/or proposition; it is rather a matter of degree. Thus, any attempt to formulate a general rule would almost inevitably result in a threshold requirement of severity so high that only a handful would meet it, or so low that it would be an ineffective screen. A middle-ground rule would be doomed, for it would call upon courts to distinguish between large numbers of cases factually too similar to warrant different treatment. Such a rule would, of course, be arbitrary in its application.

An example of a court setting a very low, to the point of disappearing, severity threshold for emotional harm recovery is *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981). Although Hawaii purports to have adopted a severity requirement, in *Campbell* five family members were permitted to recover a total of $1000 in emotional harm damages caused by the death of the family dog.

emotional harm is not so severe as to justify compensation, as many courts have recognized. See *Hagerty v. L & L Marine Services, Inc.*, *supra*, 788 F.2d at 318; *Anselmi v. Penrod Drilling Corp.*, *supra*, 813 F. Supp. at 443; *Marriott v. Sedco Forex International Resources, Ltd.*, *supra*, 827 F. Supp. at 76; *St. Elizabeth Hospital v. Garrard*, *supra*, 731 S.W.2d at 654.

In any event, there is ample objective evidence of the seriousness of Respondent's emotional harm in the case under review. The massiveness of the exposure of Respondent to asbestos fibers, and the significant increase in Respondent's risk of dying from cancer (*Buckley v. Metro-North*, *supra*, 79 F.3d at 1341) would generate extreme fear in all but the most foolhardy. That he had not sought psychiatric counselling certainly does not undercut the seriousness of Respondent's emotional harm. In Respondent's words, what "is a psychiatrist going to do for me? What is he going to tell me? I am not going to die? Is he going to tell me not to worry about it?" 79 F.3d at 1341.

C. UNDER THE ZONE OF DANGER RULE, THE FEAR OF THE PLAINTIFF NEED NOT BE OF AN IMMEDIATE PHYSICAL CONSEQUENCE.

The importance of keeping the impact rule separate conceptually from the zone of danger rule is made clear by Petitioner's argument that the zone of danger rule requires that Respondent's fear relate to "imminent physical injury." Brief of Petitioner at 22. Thus, the argument goes, Respondent cannot recover in this case because the fear relates to physical injury that may occur sometime in the future. With this bit of conceptual slight-of-hand, Petitioner

attempts to convert the factual description of most zone of danger cases into a requirement attaching to cases where there has been an actual impact.

What the zone of danger rule requires is that the plaintiff be in the zone of foreseeable risk of *impact* created by the defendant's negligence. And there is no question that in the vast bulk of zone of danger cases, the fear of the plaintiff relates to an immediate impact. If the threat of the impact is not immediate, it can be supposed that the plaintiff would have taken steps to escape from the zone of danger. And given the nature of the harm claimed by the plaintiff--fear of impact--it is logical that the consequences of the impact that the plaintiff fears will also be immediate. It would be possible, perhaps, to conjure up a case where there is fear of immediate impact but the consequences of the impact, if it does take place, are some time in the future. Would there be liability under the zone of danger rule if no impact had actually taken place? While that question might furnish grist for a first year Torts examination, it need not be answered here. In this case, and this is the point Petitioner slides over in trying to conflate the two tests, *there was an actual impact*. Even in actual impact cases, the most common fact pattern is that the impact causes immediate harm, but that certainly need not be the case. There are many cases, some of which are cited in Petitioner's brief, which do not make fear of "imminent" consequences a requisite for recovery if there has been an impact. See, e.g., *Lavelle v. Owens-Corning Fiberglas Corp.*, 507 N.E. 476 (Ohio Ct. C.P. 1987); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990); *Plummer v. United States*, *supra*, (exposure to tuberculosis bacilli); *Marchica v. Long Island Railroad*, *supra* (exposure to AIDS). Other cases include *Madrid v. Lincoln County Medical Center*, 923 P.2d 1154

(N.M. 1996) (exposure to AIDS); *Marriott v. Sedco Forex International Resources, Ltd.*, *supra* (exposure to HIV).

Following Petitioner's argument to its logical conclusion, Respondent could not recover for fear of future cancer even if the medical testimony were that the chances that Respondent would develop cancer sometime in the future exceeded fifty percent.

V. TO THE EXTENT THAT THIS COURT IS CONCERNED WITH UNLIMITED LITIGATION AND LIABILITY, THIS CASE DOES NOT PRESENT THAT PROBLEM.

This brief does not argue that every trivial exposure to asbestos generating some concern for future harm should be actionable. To some extent, of course, given the nature of the torts process, with its contingent fee system, the truly trivial case is not likely to be pursued. But courts have developed safeguards in toxic cases which are likely to screen out whatever trivial cases would otherwise get through.

In asbestos cases particularly, courts have focused on the nature of the exposure, and thus, for example, have denied recovery by wives of men who worked with asbestos (the wives alleged that they were exposed to asbestos fibers on clothes their husbands brought home). In these cases, the impact, if any, is generally too slight to generate a reasonable fear. See *Deleski v. Raymark Industries, Inc.*, 819 F.2d 377 (3rd Cir. 1987); *Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. Super. 1984). See also *Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827 (3rd Cir. 1995) (absent actual impact, generalized fear of exposure to toxic wastes not actionable).

The contrast between the facts of these cases and the case under review is stark. Respondent's fear of future cancer does not stem from some general concern following a minor exposure; rather the exposure was "massive" and was sustained over a period of years. While it may be true that in many cases, the "temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial,"[11] that certainly does not describe the facts of this case. This is not a case of a plaintiff seeking to recover for a frightening near miss during a long commute on a busy highway--a scare that most of us have suffered, perhaps too frequently. There is nothing temporary, evanescent, counterfeit or trivial about what has happened to "the snowmen of Grand Central" in this case.

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11. *Prosser and Keeton, supra*, at 361.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 15 1997
CLERK

No. 96-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD CO.,
Petitioner,

vs.

MICHAEL BUCKLEY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit

AMICUS CURIAE BRIEF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND MEDICAL AND SCIENTIFIC PROFESSIONALS IN SUPPORT OF RESPONDENT

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IN THE

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On Writ Of Certiorari to the United States Court Of Appeals For The Second Circuit

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BRIEF OF AMICI CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND MEDICAL AND SCIENTIFIC PROFESSIONALS IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 50,000 members primarily represent injured plaintiffs, including workers who have suffered harm as a result of exposure to asbestos are frequently represented by ATLA members.

In ATLA's view, the position adopted by the Second Circuit with respect to recovery of damages for emotional distress and medical monitoring under FELA is amply supported by case law. ATLA will not burden this Court with repetition of the authorities persuasively set forth in the briefs of Respondent and other amici.

ATLA believes that it can better assist this Court by presenting the views of the nation's leading experts in the field of medical protection of workers exposed to toxic substances.

These professionals have written extensively about the medical examinations given to workers exposed to hazardous substances. They have served on governmental committees to recommend public policy on the subject of medical examinations of workers exposed to hazardous substances,and they have been active in the design and implementation of medical programs designed to protect workers exposed to toxic materials.

These medical professionals are not affiliated with the Association of Trial Lawyers of America. They have received no remuneration from ATLA or from Respondent in exchange for their participation as amici. They appear before this Court as amici to explain the medical and scientific grounding for medical monitoring programs, which may be "matters far afield from the expertise of judges," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 599 (1993)(Rehnquist, C.J. dissenting)

Nicholas A. Ashford is Professor of Technology and Policy at the Massachusetts Institute of Technology, where he teaches courses in Occupational and Environmental Health Law and Policy. Dr. Ashford is also adjunct faculty at the Harvard and Boston University Schools of Public Health.

He is author of *Crisis in the Workplace: Occupational Disease and Injury*, (1976, MIT Press) and *Monitoring the Worker and the Community for Chemical Exposure and Disease: Legal and Ethical Considerations in the U.S.*, Clinical Chemistry, 40/7B Supplement, pp. 1426-1437, July 1994. He is also the co-author of *Monitoring the Workers for Exposure and Disease* (1990, Johns Hopkins University Press), *Monitoring the Worker for Exposure and Disease: Scientific, Legal and Ethical Considerations in the Use of Biomarkers*, (1990, John Hopkins University Press), *Chemical Exposures: Low Levels and High Stakes* (first edition 1991, second edition in press 1997, Van Nostrand Reinhold) and *Technology, Law and the Working Environment* (second edition 1996, Island Press).

Philip J. Landrigan is the Ethel H. Wise Professor, Chair of Community Medicine and Director of Environmental and Occupational Medicine at the Mount Sinai School of Medicine. From 1970 to 1985, Dr. Landrigan, as a commissioned officer in the United States Public Health Service, served as an Epidemic Intelligence Service officer and then as a medical epidemiologist with the Centers for Disease Control. From 1979 to 1985, as Director of the Division of Surveillance, Hazard Evaluations and Field Studies of the National Institute for Occupational Safety and Health, he directed the national program in occupational epidemiology.

Dr. Landrigan has a long-standing research interest in the clinical and epidemiologic evaluation of human diseases caused by toxic environmental and occupational exposures. His research has included studies of heavy metal poisoning, pesticide intoxication, solvent neuropathy, chronic lung disease, chemically induced renal disease and occupational carcinogenesis.

Dr. Landrigan has a strong interest in the interface of medicine and public policy. At the request of the New York State Legislature, he conducted a study of the prevalence and economic consequences of occupational disease in New York. The study concluded that occupational diseases are a serious and costly problem and led the Legislature to establish a unique statewide network of clinical centers in occupational medicine.

Dr. Landrigan is a member of the Institute of Medicine of the National Academy of Sciences. He is Editor-in-Chief of the *American Journal of Industrial Medicine* and of *Environmental Research*. He has chaired committees at the National Academy of Sciences on environmental neurotoxicology and on pesticides in the diets of infants and children. He is chair of the Asbestos Advisory Board of the State of New York.

James Melius, an occupational and environmental physician and epidemiologist, is currently Director of the New York State Laborers' Health and Safety Trust Fund. He previously worked for the National Institute for Occupational Safety and Health and the New York State Department of Health where he directed occupational and environmental health programs. As part of his work with these governmental agencies, he frequently recommended medical monitoring programs for populations exposed to toxic substances in the workplace or the general environment. He was an advisor/consultant to the court-ordered and administered medical monitoring program that was created for thousands of former workers of the Fernald, Ohio uranium plant as a result of the settlement of *Day v. NLO*, Case No. 90-CV-067 (S.D. Ohio, Western Div.).

Kenneth B. Miller is a Board Certified specialist in Preventive Medicine with a sub-specialty certification in Occupational and Environmental Medicine. He is the Medical

Director of the Seafarers Welfare Plan, a multi-employer trust fund which administers annual medical evaluations and medical surveillance programs to merchant mariners in accordance with United States Coast Guard regulations and the prevailing practice requirements in the maritime industry. Throughout his career, he has examined hundreds of individuals who have been occupationally exposed to toxic substances. In many of these individual cases, he has routinely recommended medical evaluations for the early detection and medical monitoring of the adverse health outcomes that are associated with occupational exposure to hazardous substances. He has also designed and implemented many medical monitoring and early detection programs in compliance with federal regulations that require medical surveillance for adverse health outcomes related to hazardous occupational exposures.

Laura Welch is Professor of Medicine and Chair Designate of the Department of Occupational and Environmental Health at George Washington University. Dr. Welch regularly designs and administers medical surveillance programs for workers who have been exposed to hazardous and carcinogenic substances. She served on numerous committees of the Occupational Health and Safety Administration and the National Institute for Occupational Safety and Health which made recommendations for medical surveillance programs for workers exposed to toxic substances.

Robert Wones is Professor of Internal Medicine at the University of Cincinnati School of Medicine. He is administering the court-ordered medical monitoring programs for both residents and former workers of the Fernald uranium plant. The program for residents, ordered as part of *In Re: Fernald*, No. C-1-85-149 (S.D. Ohio, W.Div.), has been operating for 6 years and the program for workers, ordered as part of *Day v. NLO*, No. 90-CV-067 (S.D. Ohio, W.D), has

been operating for 2 years. Over 10,000 people are participating in medical monitoring examinations as part of the programs.

SUMMARY OF ARGUMENT

Medical monitoring of workers exposed to hazardous and carcinogenic materials in order to meliorate the deleterious effects of the exposures is generally accepted by the medical, scientific, and public health communities and these medical monitoring programs are implemented by the government and employers

INTRODUCTION: PRINCIPLES OF PREVENTIVE MEDICINE

This brief expresses medical opinions that constitute the same advice that the parties would offer to any person who sought their professional opinion based on mainstream medical expertise about the prudent steps to be taken when a person has been exposed to carcinogenic substances.

The opinions presented begin with the premise "an ounce of prevention is worth a pound of cure". This well-known aphorism is the cardinal principle upon which preventive medicine is based. Similarly, it is the guiding principle of occupational and environmental medicine, the sub-specialty of medicine that deals with people who have been exposed to hazardous substances.

The opinions and recommendations offered are medically sound and prudent. The recommendations are fiscally prudent as well. Medical examinations for the early detection of cancer are fiscally prudent and cost effective because early detection of disease can not only save lives and lessen

suffering, but they also can lessen the cost of treating cancer, which when found later can require more expensive treatment.

Medical monitoring of people exposed to asbestos is a generally accepted and practiced procedure of preventive medical practice. Protocols have been developed for people exposed to asbestos. These protocols, which are based on the toxicity and carcinogenicity of asbestos, are used by doctors who, as they do with all other standard medical protocols, use them as a basis of treating individual patients.

I. MEDICAL MONITORING PROGRAMS FOR WORKERS EXPOSED TO CARCINOGENS ARE IMPLEMENTED BECAUSE THE DELETERIOUS EFFECTS OF CANCER CAN BE AMELIORATED BY EARLY DETECTION ACCOMPLISHED BY EXAMINATIONS TARGETED TO THE TYPES OF CANCER KNOWN TO BE CAUSED BY THE HAZARDOUS EXPOSURES

The benefits of the early detection of cancer are an integral part of contemporary public health and medical practice. Examinations for the early detection of cancer are universally accepted. Perhaps the most widely recognized of these guidelines and recommendations is from the American Cancer Society which recommends a variety of exams for the early detection of cancer.

> [A]fter an extensive review of the available information, the Society finds that the early detection of cancer is a very important health promotion activity.

Ca-A Cancer Journal for Clinicians: ACS Report on the Cancer-Related Health Checkup, July/August 1980, Vol. 30, No. 4, page 195.

The strategy of doing diagnostic exams on people in order to find early signs of cancer is based on various benefits that early detection can provide. In the first instance, early detection can lead to improved prognosis and better survival rates. Early diagnosis may also permit a wider range of therapeutic options. Early detection also leads to better quality of life in the time that a person survives.

The American Cancer Society has long been in the forefront of recommending prophylactic examinations for the early detection of cancer. Its recommendations, as well as the recommendations of other groups such as the American College of Physicians and Surgeons, are for the population at large and not for sub-groups within the population that are at an increased risk of cancer. *Preventive Care Guidelines: 1991 Annals of Internal Medicine*, Volume 114, No. 9, May 1991, page 758; *Guide to Clinical Preventive Services: An Assessment of the Effectiveness of 169 Interventions: Report of the U.S. Preventive Services Task Force*,Williams & Wilkins, Baltimore, 1989. For example, the American Cancer Society does not recommend chest x-rays to detect lung cancer in the general population but does recognize that x-rays to detect lung cancer are appropriate for groups with a higher risk of lung cancer. Fink, Diane J., *Guidelines for the Cancer-Related Checkup*, American Cancer Society, Atlanta, 1991.

II. MEDICAL MONITORING OF WORKERS WHO HAVE BEEN EXPOSED TO HAZARDOUS AND CARCINOGENIC SUBSTANCES IN ORDER TO AMELIORATE THE EFFECTS OF EXPOSURES HAS LONG BEEN A CARDINAL PRINCIPLE OF THE MEDICAL AND SCIENTIFIC COMMUNITIES AND

IT HAS BEEN IMPLEMENTED BY EMPLOYERS AND REQUIRED BY NUMEROUS GOVERNMENT AGENCIES

Occupational and environmental medicine is the sub-specialty of preventive medicine that concerns itself with toxic exposures in the work place. It has been long recognized that even though efforts are made to control hazardous exposures, a necessary element of any protective system in which people are exposed to hazardous materials is medical monitoring to look for early signs of disease. Hankinson, John L., *Pulmonary Function Testing in the Screening of Workers: Guidelines for Instrumentation, Performance, and Interpretation*, Journal of Occupational Medicine, Vol. 28, No. 10, October 1986, page 1081. Goldsmith, J.R, et al., *Pulmonary Function Screening and Monitoring in Occupational Health*, Journal of Occupational Medicine, Vol. 28, No. 8, August 1986, page 656. Federal law requires on-going medical monitoring of workers exposed to twenty one hazardous substances, including asbestos. 27 U.S.C. §651, et seq.; C.F.R. 1910.1003 to 1910.16. For asbestos and other toxic substances, the Occupational Safety and Health Administration requires monitoring to detect early signs of disease in order to ameliorate the effects. Silverstein, Michael, *Analysis of Medical Screening and Surveillance in 21 Occupational Safety and Health Administration Standards: Support for a Generic Medical Surveillance Standard*, American Journal of Industrial Medicine, 26:283-295 (1994). Specifically in the case of asbestos, OSHA requires that an exposed worker receive x-rays and other tests to look for early signs of lung disease.

The U.S. Department of Energy, which owns the nuclear weapons production plants, has for decades required that the operators of these plants maintain on-going medical monitoring programs for their workers because of the possibility of exposure to carcinogenic materials. U.S. Atomic

Energy Commission, AEC Manual OR 4161-03, *AEC Employee Occupational Health Services Program*, 1972. U.S. Energy Research and Development Administration, *Contractor Occupational Medical Program*, Appendix 0528-A. U.S. Department of Energy, Environmental Protection, Safety and Health Protection Program for DOE Operations, DOE 5480.8, *Contractor Occupational Medical Program*, 5-22-81, 11-16-87, 6-26-92. Medical monitoring for former DOE weapons plant workers who have been exposed to carcinogens at hazardous levels is mandated by statute. 42 U.S.C. §9604. The Department of Energy funds medical monitoring programs for former workers who were exposed to carcinogenic materials, which includes examinations to accomplish the early diagnosis of cancer. The Agency for Toxic Substances and Disease Registry is authorized by statute to implement medical monitoring programs for people who have been exposed to hazardous substances. 42 U.S.C. §9604(i)(9).

Medical monitoring of workers and former workers for the early direction of cancer is not only deemed necessary by the public health community and government agencies, but the need for this kind of service is widely recognized by the employers. Many large employers maintain occupational medical programs to provide these protective services to workers. Hulka, Barbara S., *Screening for Cancer: Lessons Learned*, Journal of Occupational Medicine, Vol. 28, No. 8, August 1986, page 687.

The role of the employer in providing these services is crucial because these services are not typically covered by traditional providers of medical services. Most health insurance programs and health maintenance organizations do not provide the examinations medically needed because a worker is at increased risk of cancer when of a hazardous exposure.

Nor does workers compensation pay for these kind of prophylactic examinations. Ironically, workers compensation may have to pay for the treatment of a cancer that is deemed to be caused by the workplace, but it does not provide the exams that would prevent and ameliorate the effects of the cancer caused in the workplace. There is no question that a person who has an increased risk of cancer because of hazardous exposures should participate in a medical monitoring program to meliorate the effects of the cancer (this concept is akin to the legal doctrine of "mitigation of damages"), yet existing medical insurance programs very rarely pay for these services.

III. THE CRITERIA FOR MEDICALLY MONITORING PEOPLE WHO HAVE BEEN EXPOSED TO TOXIC AGENTS ARE WELL ESTABLISHED AND RECOGNIZED IN THE SCIENTIFIC AND MEDICAL COMMUNITY

The criteria for medically monitoring people exposed to hazardous agents are widely recognized and accepted. Generally speaking, these criteria include knowledge of the toxic effects of the exposure, the availability of diagnostic exams that identify signs of illness at early stages, and the existence of effective treatment that can be administered when early signs of disease are discovered.

An excellent summary of the generally accepted principles for medical monitoring of people exposed to hazardous substances is found in the Agency for Toxic Substances and Disease Registry's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA.[1] Federal Register, Volume 60, No. 145, July 28, 1995.

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[1]The ATSDR is authorized under CERCLA to conduct medical monitoring of residents near hazardous waste sites.

Monitoring is periodic medical testing to screen the individuals who are at increased risk of disease but who have not shown symptoms of the disease.

The criteria include:

1. Exposure to contaminants at levels known to cause adverse health outcomes.
2. Documented health research that exposure to the substance causes known health effects.
3. The ability of an examination to predict the presence or absence of a disease.
4. The availability of effective treatments when there is early detection of disease.

IV. THE OCCUPATIONAL MEDICAL COMMUNITY HAS FOR MANY YEARS RECOMMENDED AND CARRIED OUT MEDICAL MONITORING PROGRAMS FOR WORKERS WHO ARE OR HAVE BEEN EXPOSED TO ASBESTOS BECAUSE THE SPECIFIC CANCER RISKS TO THAT POPULATION CAN BE IDENTIFIED AND EXAMINATIONS ARE AVAILABLE TO AMELIORATE THE EFFECTS OF THOSE DISEASES BY EARLY DETECTION

Asbestos is known to cause a number of cancers including lung cancer, mesothelioma and cancer of the bowel, as well as other non-malignant conditions. These diseases do not typically occur until years after exposure. The occupational medical community has for many years conducted medical monitoring programs of workers who have been exposed to asbestos in order to meliorate the effects of these cancers by early detection. Protocols for these programs have been carefully developed over a number of years and have been carried out on tens of thousands of

workers. Cancers have been detected and lives have been saved, prolonged and improved.

Medical monitoring programs for workers exposed to asbestos not only have demonstrated benefits directly attributed to the early detections accomplished by the exams, but there are other important health benefits for workers. For example, it is known that the carcinogenic effects of asbestos and cigarette smoking together have a synergistic relationship. This means that the risk of smoking and the risk from the asbestos, when combined, creates a risk that is much larger than each of the two risks added together. This synergistic risk, which can be increased as much as 50 fold [Selikoff, Hammond, Churg, *Asbestos Exposure, Smoking and Neoplasm*, JAMA 1968, 204:104-110], is emphasized as part of a medical monitoring program. Workers are taught that the combined risk of smoking and asbestos is enormous and the workers are encouraged to participate in smoking cessation programs. As part of the medical monitoring program for asbestos workers, they are taught how to look for early signs of disease and how to avoid other exposures to protect themselves against worsening the increased cancer risk they already suffer. Medical monitoring programs also include promoting dietary changes which the person with increased risk can make in order to further protect against the increased risk of cancer.

CONCLUSION

For the foregoing reasons, Amici ask this Court to affirm the judgment of the Second Circuit.

Respectfully submitted,

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January 15, 1997